

David Ball



Don Keenan



REPTILE **in the Mist**

(AND BEYOND)

The Plaintiff's Attorney's Guide to the MIST-case Revolution

WITH

Ken Altman | Don Chaney | Nathan P. Chaney | Taylor Chaney
Jeffrey H. Cohen | Arthur C. Croft | Michael Freeman
Rick Friedman | Danita Glenn | Gary C. Johnson | Artemis Malekpour
Joey McCutchen | Chris Rodd | Dorothy Clay Sims | Alvin Wolff

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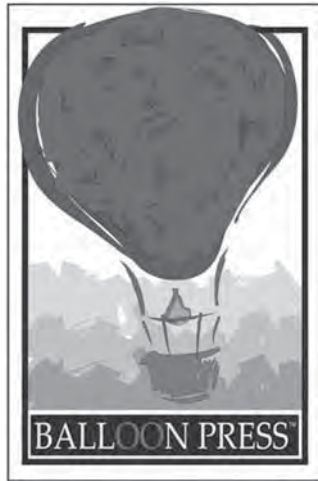
Joey McCutchen

Chris Rodd

Dorothy Clay Sims

Alvin Wolff

“Reptile in the Mist (and Beyond) forever majorizes MIST cases, and bolsters Reptile practitioners in every other kind of case regardless of size.”



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© 2013 by Balloon Press, New York, NY
Published by: Balloon Press, New York, NY

ISBN: 978-0-9774425-7-7
Library of Congress Control Number: 2013946450

Printed by: BookMasters, Inc.
Printed and Bound in Ashland, Ohio

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For information address: Balloon Press, 300 Park Avenue, 17th Floor,
New York, NY 10022

Caveat: The Fine Print in Big Letters

This is a strategy book, not a law book. Decisions about how to frame this book's strategies so as to be legally proper are the reader's responsibility. Please do it right so you don't hurt your clients or make bad law. Official Reptile state list serves can help you. And we frequently cover the topic in Reptile seminars, including information we do not publish, for use in countering defense motions seeking to limit what you can do.

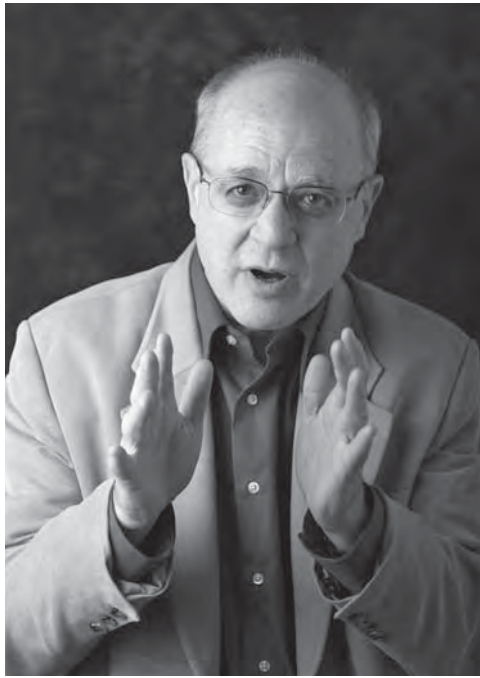
Dedication

To Ralphie and to the Legion of the Reptile Who Beat the Bullies



*Success is not the result of spontaneous combustion.
You must set yourself on fire.*

—Fred Shero, Hockey Player



David Ball, a co-founder of Reptilian Advocacy, is a litigation strategist with North Carolina's Malekpour & Ball Consulting (JuryWatch), a national consulting firm. He is widely acknowledged as the nation's most influential and effective jury consultant, communications expert, and advocacy teacher. His training is in science, engineering, small-group communications, and theater, and he's a 30-year veteran of the professional theater.

Dr. Ball and his partner, lawyer/consultant Artemis Malekpour, consult on civil and criminal cases of every size across the country, and are routinely credited with turning the most difficult cases into high-verdict victories. They are the nation's only trial consultants qualified to safely and comprehensively guide attorneys with up-to-date Reptilian methods and strategy.

Dr. Ball is also a pioneer in adapting film and theater methods into trial techniques. His theater/film students have won Oscars, Obies, Tonies, and Emmies; his scripts have been done at professional theaters off-Broadway and throughout North America and overseas; his major theater credits include the Guthrie Theater and Carnegie-Mellon University's renowned theater conservatory. His best-selling film and theater training book, *Backwards and Forwards*, has been the field's standard every year since 1984, and it perennially occupies a top spot on Amazon. And for two decades, the three editions of his best-selling crossover text, *Theater Tips and Strategies for Jury Trials*, have set the standard for the use of film and theater techniques in litigation.

Dr. Ball has taught law students at North Carolina, Wake Forest, Pittsburgh, Minnesota, Roger Williams, Loyola, and Campbell schools of law, and at Duke University as

Senior Lecturer in Law. He teaches for the American Association for Justice's National College of Advocacy. He has long been the nation's most in-demand Continuing Legal Education speaker, and holds the North Carolina Advocates for Justice's Charles Becton Award for Excellence in Advocacy Teaching.

Dr. Ball authored the two best-selling trial strategy books ever written: *David Ball on Damages* and – with Don Keenan – *Reptile: The 2009 Manual of the Plaintiff's Revolution*.

In addition to consulting and teaching, Dr. Ball and partner Artemis Malekpour are currently working with Dr. Pate Skene and other leading Duke University neuroscientists and law professors on long-term clinical research into the neuroscience of juror decision-making.

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Don Keenan

TRIAL LAWYER

Don Keenan is the founder of the Reptile who, with David Ball, co-created and co-authored the *Reptile* book in 2009. During his 35+ years of practice, Don has secured over 247 verdicts and settlements over \$1,000,000, including ten over \$10,000,000 and one over \$100,000,000. Don has dedicated his practice to child and adult injury and wrongful death cases arising from medical negligence, products liability and premise liability, with the goal of making our society safer for children. He has handled cases in 47 states and three continents. He has offices in Atlanta, New York City, and Southern California. www.keenanlawfirm.com

CHILD ADVOCATE

Don strongly believes that a plaintiff attorney's duty does not end when justice has been secured for the child and family. Equally important is learning from the prevention lessons of the case and formulating a public awareness campaign to help prevent future injuries and deaths and, when necessary, push for legislation and regulations.

He calls this unique approach to law the One-Third Solution: One-third litigating the case, one-third public awareness on prevention, and one-third pushing for regulations and legislation. Examples of his One-Third Solution include his Playground Safety Project, which was featured on the *Today Show* for three years running, and the Toy

Safety Campaign profiled in *USA Today* and on *Good Morning America*. Additionally, the *Imagine* magazine summer 2005 issue featured Keenan and his One-Third Solution, as did *Mercedes Momentum* magazine in the winter of 2004.

Don has appeared on every major national news program including 60 Minutes, 20/20, Larry King Live, The Oprah Winfrey Show, Montel, The O'Reilly Factor, the Today Show, Good Morning America, CNN, and National Public Radio (NPR), and the BBC addressing children's issues.

In 2009 Don established the www.keenanskidsfoundation.com with national activities.

AWARDS AND DISTINCTIONS

- Selected by Oprah Winfrey as one of the "People Who Have Courage," notably for fighting for the rights of abused children for 30 years
- "Career Achievement Award for Public Policy and Child Advocacy" bestowed by Emory University
- Named by the *National Law Journal* as one of the top three medical malpractice lawyers in the U.S.
- Called "The Voice of the Voiceless" by *The Atlanta Globe*
- "Internationally renowned child advocacy lawyer" by *Points North Magazine*
- "A famous advocate for children" by *Business Chronicle*
- Ten-time recipient of "Top 100 Irish Americans" presented by *Irish America Magazine*
- 2007 Ellis Island Medal of Honor (only 100 awarded each year)
- 2008 Tradition of Excellence Award by the State Bar of Georgia
- Published the best-selling consumer book, *365 Ways to Keep Kids Safe*, awarded a Gold Medal for "Best Parenting Book" in 2008 by Publishers Marketing Association

PROFESSIONAL ACCOMPLISHMENTS

In 1992, Don became the youngest National President of the American Board of Trial Advocates www.abota.org. During his tenure, he led a delegation of lawyers to Czechoslovakia and later was invited to Russia to produce the first civil trial in the history of those two emerging democracies.

In 1997, he became National President of the Inner Circle of Advocates (www.innercircle.org), the most exclusive group of trial lawyers in the country. In 1999, he was given the prestigious Chief Justice Award for Civility and Professionalism, the highest award possible for a lawyer in Georgia. He now serves on the Advisory Committee for the National Judicial College in Reno, Nevada. In 1990 and again in 1992, he was named Trial Lawyer of the Year.

Beginning in 2010, Don has written a weekly blog with 5,000+ subscribers www.keenantrialblog.com. Beginning in 2012 has written a monthly pro bono column published in many trial lawyer publications in the U.S.

SIGNIFICANT CASES

Don successfully handled the U.S. Supreme Court case of Kathy Jo Taylor in the 1980's, which was the first case in U.S. history to establish due process rights for foster children. Again, in late 1999 he handled the nationally publicized case of Terrell Peterson, an abused foster child who was on the cover of *Time Magazine* (Nov. 2000) and was the subject of the highest rated 60-Minute story of the year. Both cases resulted in significant changes in the rights of children in state custody. In 2006, he obtained the largest U.S. jury verdict for an abused child.

LEGAL BOOKS BY DON C. KEENAN

- *Out-of-State Practice of Law*; Pro Hac Vice, 1981, Harrison Publishing Company.
- *Social Security Law*; Procedure, 1986, Harrison Publishing Company.
- *Obstetrical Medical Negligence*, 1991, Law Press, Inc.
- *Closing Arguments: Child Injury Wrongful Death*, Volume I, 2004, Balloon Press.
- *Closing Arguments: Child Injury, Wrongful Death*, Volume II, 2008, Balloon Press.
- *Reptile: The 2009 Manual of the Plaintiff's Revolution*, 2009, Balloon Press (With David Ball).
- *The Keenan Edge*, 2012, Balloon Press.

CONSUMER BOOKS BY DON C. KEENAN

- *365 Ways to Keep Kids Safe*, 2005, Balloon Press.
 - First place, Benjamin Franklin Book Award by Publishers Marketing Association, Best Parenting Book of 2008.
 - Outstanding Book by National Organization Exceptional Parent.

AUDIO LECTURES BY DON C. KEENAN

- *Faces of the Future: How to Be a Better Lawyer for Children*. 10 lectures re-mastered by Trial Guides.

AUDIO BOOKS BY DON C. KEENAN (WITH DAVID BALL)

- *Reptile: The 2009 Manual of the Plaintiff's Revolution* (Audio Book), 2012, Balloon Press.

DVDs BY DON C. KEENAN

- *Reptile: The Keenan Law Firm Method to Witness Preparation* (DVD), 2009, Balloon Press.
- *Reptile: Voir Dire-Keenan/Ball Method of General and Case Specific Voir Dire* (DVD), 2010, Balloon Press.
- *Reptile: The Ball Method of Opening Statements* (DVD), 2011, Balloon Press (With David Ball).

Introduction to *Reptile in the MIST (and Beyond)*

*Your old road is rapidly aging.
Please get out of the new one
If you can't lend your hand,
For the times they are a-changin'.*
—Bob Dylan

This book's genesis was our multi-presenter Reptile MIST seminar in 2012. Don Keenan selected speakers who could be the most help. We quickly saw that the seminar's content could be the basis for a useful book, and that much of it applied to every size case.

For MIST cases, the Reptile track record is clear and one-sided: good MIST verdicts are now the rule, and by factors from ten to a hundred or more than pre-Reptile.

Until now, MIST has meant “Minor Impact Soft Tissue.” Some think it’s “Minor Injury Soft Tissue.” But as you’ll see, a six mph impact can be major. A ton of metal hitting something at six mph is “minor” only in the mouths of insurance companies and their attorneys. It’s actually greater force than dropping that ton of metal on you from more than a foot high!

DO YOU HAVE THE TIME OR MONEY TO APPLY THE REPTILE IN MIST CASES?

Of course. Once you’re on the way to mastering the approach, you’ll need little more time or money than before.

WHO SHOULD NOT BOTHER?

If you won’t work hard enough to climb the steep hill of Reptile mastery, forget it. The Reptile is no sack of random tricks from which to pick and choose. It is a comprehensive method that embraces every step of litigation. It requires diligence. No shortcuts.

NEW TO REPTILE?

If this book is your first exposure to Reptilian advocacy (a brief seminar or a seminar from outsiders does not count), you should stop until you’ve read the *Reptile, the 2009 Manual of the Plaintiff’s Revolution*, or been to either the full-day Reptile video seminar or the two-day live “Introduction to the Reptile” seminar.¹ But if you can’t stop reading this book now that you’re started, re-read it after learning the basics from the *Reptile*

¹ Seminar schedule at ReptileKeenanBall.com. If you’re a new lawyer in need of payment assistance, we have a few scholarships available.

book and our intro seminars. Meantime, our footnotes in this book will direct you to explanations that may be new to you.

Then read:

David Ball on Damages Edition 3 (from Trial Guides)

The Keenan Edge (from ReptileKeenanBall.com)

Rules of the Road Edition 2 (from Trial Guides)

Closing Arguments Vol. 1, 2 (from Trial Guides or ReptileKeenanBall.com).

Keep *Reptile*, *David Ball on Damages*, and *The Keenan Edge* by your side as you read this book. We refer to them often and you'll want to follow the references.

Finally, seek out our Reptile workshops and advanced Reptile seminars, the state Reptile List Serves, and the Keenan Blog. <http://www.keenantrialblog.com/>

The defense. The defense has no substantive defense to the Reptile. They teach seminars and write articles about it, but they are helpless except to object: "Judge, he shouldn't be allowed to say that!" But even in the unusual circumstance when a defense objection prevails, we always have alternative ways to accomplish the same thing.

THE REPTILE FAMILY

In starting on your road to Reptilian advocacy, you join a nationwide team of thousands who use, refine, advance, and share their knowledge of the Reptile. The team – the network, the family – has revolutionized plaintiff's trial advocacy. In 2012 in Atlanta, we held the tort-"reform" public wake – bagpipes and all – in honor of the death of tort-"reform." We're sorry if you missed the wake, and we're eager to welcome you aboard.

Don Keenan and David Ball

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Overview

In 2009, David Ball and Don Keenan introduced the Reptile to trial attorneys. *Reptile in the MIST (and Beyond)* now revolutionizes the more specific world of MIST-case advocacy, and takes the Reptile to new levels in every other kind of case. Drawing on Ball and Keenan's own work as well as that of the MIST specialists in this book, *Reptile in the MIST (and Beyond)* joins the 2009 *Reptile* book as a landmark in restoring justice. The defense side of the aisle has been squealing like stuck pigs about the Reptile, and no one can blame them. They are indeed stuck.

In **Chapter One**, Don Keenan, appropriately, starts us off with a range of key topics including stipulated cases, "Independent" medical examiners, pivotal voir dire questions, how to handle Defense medical examiners, and a wide range of other topics to get you started in making your MIST cases major.

In **Chapter Two**, Gary Johnson explains how and why to credential your client, how to turn problems like previous injury or degenerative disk disease to your advantage, and how to protect your client during depositions and defense medical examinations.

In **Chapter Three**, Rick Friedman explains why and how to force the defense to commit to a clear position on topics such as malingering, and how to expose the dishonesty of their attacks.

In **Chapter Four**, David Ball shows how to turn the defense expert into a dishonest Reptilian menace in the eyes of the jury.

In **Chapter Five**, David shows how and why to present the mechanism of the wreck (or whatever the instrument of harm was) and the mechanism of the injury, turning low-speed impacts into significant harm cases. David also discusses high-school science teachers as experts, and often-missed brain injury in MIST cases.

In **Chapter Six**, David's partner, Artemis Malekpour, reviews problem areas in opening statements.

In **Chapter Seven**, Artemis explains how you can afford focus groups – even full deliberating sessions, which are the best way to improve over time as an attorney.

In **Chapter Eight**, Nathan Chaney shows how to handle the common danger of negative X-ray results from emergency-room doctors.

In **Chapter Nine**, Dr. Jeffrey Cohen, one of America's leading chiropractors, explains the mechanism of nerve injury, a crucial component of harm that significantly increases case value. Dr. Cohen's explanation is also a practical illustration of a good "Mechanism of Harm" argument, one of the Reptile's strongest damages techniques.

In **Chapter Ten**, Don Chaney discusses new technology in diagnosing injuries in MIST and other cases. No longer can the Defense point to X-rays and scans that seem "normal," leaving us with no objective findings.

In **Chapter Eleven**, Don Chaney outlines common MIST defenses.

In **Chapter Twelve**, leading forensic epidemiologist Michael Freeman explains how his field transforms MIST and other cases – including how to deal with the most common and dangerous defense causation arguments.

In **Chapter Thirteen**, Dorothy Clay Sims shows how to expose defense experts' lies, hypocrisy, and betrayal; and other issues including how to handle uncooperative treating doctors.

In **Chapter Fourteen**, Don Keenan further explains how to work with reluctant treating physicians.

In **Chapter Fifteen**, Joey McCutchen discusses the need for attorneys to help protect the 7th Amendment. Joey also discusses cutting-edge diagnostic tools that turn previously unseen injuries into documented objective injuries.

In **Chapters Sixteen and Nineteen**, Danita Glen and Ken Altman describe their first times using the Reptile. They show the Reptile's power even when you're just getting stated.

Chapter Seventeen, Chris Rodd's brief but essential chapter, teaches how a half dozen lay witnesses can be stronger than even the best experts.

In **Chapter Eighteen**, Alvin Wolff describes a Reptilian mediation.

Chapter Twenty, by Don Chaney, Nathan P. Chaney, and Taylor Chaney, provides a Plaintiff's Motion, a Brief in Support of Plaintiff's Motion and an Order to Exclude Evidence (and Argument) Relating to the "MIST" Defense Theory under the Daubert Test.

In **Chapter Twenty-One**, Dr. Arthur C. Croft, a leading biomechanist, trauma epidemiologist, and accident reconstructionist, explains specialties for use in MIST and other cases.

David Ball's **Afterword** explains how and why to change our profession's public image; that it can't be done with words, arguments, "war rooms," and explanations; and that if we don't do it, Federal legislation will inevitably make justice impossible.



DON KEENAN

MIST Cases, All Cases, and the Reptile

WHO'S GOT THE REPTILE?

Tort “reform” owned the Reptile for 37 years, and no one on our side did a thing about it – until ’09, when we transferred ownership of the Reptile to you. So you are reading this book because your survival is being threatened, your very livelihood, and the security of your family. You are reading this book to arm yourself and make your survival strong.

Despite its track record, some folks (who don’t know much about it) still say the Reptile doesn’t work. Yet in case after case our Reptile MIST specialists have gotten, say, \$120,000 against no offer when the verdict “should” have been a small fraction of that. Don Cheney from Arkansas got a million. A whole new world for these cases is out there, but some people still say, “Can’t work! Nope!”

Well, the comedian is right: You can’t fix stupid.

That’s not the only thing that chaps David and me to the point where I want to get physical. It’s also lawyers who tell us, hey, give me the tricks. Give me the checklist. Don’t give me all this horseshit about philosophy and science and the foundation and all that, just give me something friggin’ easy. When they come to our seminars and say that, I say, “OK, here’s what’s easy: here’s your money back. Go away.” Because the Reptile is not tricks or checklists. Never has been, never will be. Sure, there are bits and pieces you could call tricks and lists, but top to bottom, the Reptile is a *process*. The Reptile’s many pieces fit together like a three-dimensional mosaic or a symphony. Yes it’s hard work; yes the learning curve can be slow. But if that’s not what you want, go away.²

Page 225 of the Reptile book says, “There are no small cases, only small lawyers.”

When I started practicing, MIST cases didn’t need the Reptile. They were automatic: Three times the specials or you went to trial. But today no one routinely gets 3X specials. The insurance companies now make you scramble for crumbs. “Please, please, gimme a settlement, please.” And as this slowly came about, lawyers were the boilin’ frog: put the frog in the water, slowly turn up the heat, the frog never gets around to jumping out. So now we’ve got a bunch of lawyers turned into boiled frogs.

2 See Keenan Edge, p. 25.

But that's over. We've got the Reptile. The Reptile teaches us, and teaches us how to teach ourselves. Here's one way I learned: I was doing 55 on a freeway when a huge SUV doing 85 rear-ended me. Totaled my Mercedes, which ain't easy. Put me in a coma for two days, ICU another seven. Since then, I'm scared to death out on the highway. Every time I see headlights, I start sweating, my hand starts shaking. A couple of times I pulled over and stopped, and said, "I can't take it. I'm going to do something crazy out here." So I went to my psychiatrist. He's cured me about four, five times, and I said, "Doc, what's going on here?"

"You've subscribed to the psychiatric syndrome called 'the other shoe dropping.' That means that in your head it's not a question of whether or not somebody will put you in a coma again, it's a matter of when. You're in constant fear of it."

RULES AS PART OF DAMAGES

So what did that teach me about the Reptile? This: When the defense stipulates to liability, you think you can't talk about the rules – but you can talk about damages, and one of the largest damages is psychological damage. Your client knows she was hurt by the violation of a rule she knew was supposed to protect her. Now her trust is shattered. That causes mental damage: terror of the future.

Tough guys in bib overhauls, 400 pounds, will break down in tears and talk about being afraid to go on the highway. Orthopedic doctors now ask about this kind of damage on their patient intake form. If the doctor does not write this down when your client tells it to them, have your client write it down and say, "Doctor, these are important harms to me, put them in my file." And they will. So when the defense stipulates liability and thinks that keeps you from talking about the rules, I say, "Well judge, that's true. It doesn't come in – on liability. But it comes in under damages. We've got medical support for it, and more importantly our client says it."

Last year I had a 75-year-old client. I said, "You've had some physical injuries, haven't you?"

"Yes."

"They hurt, don't they?"

"Yes."

"What about psychological injuries?"

"Oh my God, they're worse. They're worse."

"Tell me about it."

"Well, I've got a 22-year-old daughter who lives with me. I beg her not to go on the highway. I'm in terror it's going to happen to her. They're going to violate the safety rules. It's going to take my precious daughter away from me. I was never like that before."

Even with the most brain-dead judge in the world, you lay the right predicate and that's coming in. So when the defense stipulates, you still get into evidence every bit of liability evidence. Four of my last five trials were stipulated. And I got everything in.³

3 See Keenan Edge, 109-110.

“WHAT DID YOU LEARN, MR. DEFENDANT?”

Ask the defendant, “What lessons did you learn from what happened?” Plant the seed for this in jury voir dire: “As a parent, when your child breaks rules and does something wrong, how many of you want to know if she learned any lessons from it?” And, “What did she learn?” When you follow up, some of them may tell you – or you can explain later – that what they learned shows whether the child understood why what he did was wrong. If he blames somebody else, or says they didn’t learn any lesson, then you know you have to step up and be a parent: Teach the lesson or they’ll do it again.

So in depo we often ask the defendant, “What lesson did you learn?”

They look at the ceiling, they look at the defense lawyer, they look at their foot. They think, “Oh shit. How do I answer this?” And they usually say something like, “Well, what I learned is that shit happens.” That tells the jury the defendant learned no lesson. And the jury-Reptiles won’t put up with that, because learning the lesson is embedded in taking responsibility. Jurors know that someone who hasn’t learned the lesson is a huge spreading of the tentacles of danger⁴ – because it endangers anyone in any situation, including situations the jurors are in every day of their lives.

And yes, you can do that with stipulated cases: the psychological damage is that “now I believe we can’t trust people on the highway [or wherever] because some of them not only violate the rules and hurt people, but then they don’t take any lesson from it so they’re going to go on breaking the rules again – maybe on me or someone I love.”

Fake boogeyman: the “Independent” Medical Examiner. Years ago I was involved in a series of 22 expanded mock trials all over the country. All the same case, all with a strong IME. And we had the National Jury Project analyze the results. One thing they saw across the board was that despite every one of the sessions having 90 minutes of deliberations, none of them spent more than a minute or two on the IME. At most, a juror might have said, “Remind me, did the IME actually treat the injured party?” Another juror said no, and that was the end of it.

So you don’t need to spend much time with these IMEs. You can if you have good stuff on them, but a lot of the time you don’t need much more than this:

“When did you become the treating doctor?”

“I didn’t.”

“Who says you’re independent?”

“Me.”

“How can you be independent when Susie over here didn’t go to you or choose you?”

“I don’t know.”

“How you can be independent when Susie’s not paying you, and all your money’s coming from that side over there?”

4 See “Tentacles of Danger” in *Reptile*, 58-60.

"I'm independent, I'm independent. Trust me."

"And by the way, you can't prescribe her medications?"

"Right."

"Or order a procedure?"

"Right."

"You saw her for 30 minutes?"

"Right."

"She's been seeing her treating doctor for over 35 visits?"

"Right."

"And your 30 minutes disagrees with his two years and 35 office visits?"

"Right."

"And you do this a lot, don't you?"

"I don't know what you mean by a lot."

"30 times a year?"

"Right."

"Thank you."

And you look at the jury and you shrug, like what in the hell was that?

One of the mistakes is thinking the IMEs carry more weight than they do. So our own Reptile makes us lash out at them. That reveals we're afraid of them, which in turn shows we think they're right. There's nothing there to be afraid of.⁵

THE STIPULATED CASE AND REPENTANCE

If you've been to the Reptile Master's Seminar, or read the Reptile book, you know the three steps to repentance for use in the face of stipulated liability. You tell jurors what real repentance means:

Number 1, admit you did it.

Number 2, promise you won't do it again.

Number 3, (the most important), make it right.

In stipulated cases, the defense conveniently omits 2 and 3, the most important ones to the Reptile.

So in closing: When you march your little boy over to the neighbor's to admit hitting his ball through their window, you want your little boy to say three things: Number 1, I did it. Number 2, I'm not gonna do it again. Number 3, I'm gonna pay for it. But what you have here, ladies and gentlemen, is fake repentance. You've got them trying to pull the wool over your eyes – fake repentance. We wouldn't be here if this were true repentance. They'd have paid what they should, and we wouldn't be here. So now you've got the responsibility to make them accept their responsibility. All they're doing is blowing smoke and thinking you're stupid."

5 See Keenan Edge, p. 133, "The IME."

You've got the right to say this as soon as the defense even implies that they've accepted their responsibility.⁶

You can lay the ground for this with a jury voir dire "which way do you lean?" question about how prospective jurors feel about the differences between admitting you did it and accepting responsibility for having done it.

In Los Angeles, Brian Panish tried five cases in seven months. Eight-figure verdicts, all five. Every single one stipulated. In every one he used that repentance argument.

It works especially well in MIST cases.

In nine states, the timing of the stipulation is inadmissible. They say this is so defendants will be encouraged to settle: if the plaintiff can bring it up, then next time the defense won't settle. But think about that. It creates a public policy that tells defendants to wait until the last minute, the day of trial, to stipulate.

So: "But Judge, the public policy we want is to settle early. Save judicial resources. Save stress on the plaintiff. Cut down needless and stupid depositions that do nothing but create billable hours."

True public policy is to make them do it early, and punish them if they don't. Judge, you make the determination. What did the defense know on the day of trial that they didn't know a year earlier? You decide. And if you decide they've just dragged your court and the people of this county through needless litigation, to say nothing about the stress on my client, then we get to tell the jury that the defense stipulated just this morning. *That's* public policy."

I told this to a judge. He said, "I'm going to do what you said, Mr. Keenan. I'll ask in camera what they know now that they didn't know a year ago." And they went in. The judge came back out. He said they didn't know a thing at the end that they didn't know at the beginning.

So if you're in one of those nine states, try it. And we need to change this law.

FOCUS GROUPS

Almost anyone can learn to do focus groups, set them up, even run them. But you have to do them right, and the art comes in the analysis: What are we seeing here? What does it mean? I see lawyers doing their own analysis and getting it flat wrong. That's where we get involved, or David's partner, Artemis Malekpour.⁷

6 **DB note:** Don's repentance argument is relevant in stipulated cases for another reason: Stipulation without responsibility can make your client feel worse than no stipulation at all, because it shows they admit did they it and don't care: screw you! So it goes to emotional suffering.

7 See *The Reptile: How to do Focus Groups in House* (ReptileKeenanBall.com) and *How to do Your Own Focus Groups* (TrialGuides.com).

Life expectancy. Georgia and other states have mortality tables. They say how long your client will live – 72, 78, whatever. As a puppy lawyer, I would have killed to get those admitted into evidence. “Oh, judge, please take judicial notice of the mortality table. Oh, ladies and gentlemen, it says here life expectancy. . . .” But now I know I was shooting myself in the foot. Bubba and bubette say the average life expectancy in the year 2012 is north of 90. In focus groups they tell you about their aunts and uncles, movie stars like Betty White, God knows who else. It’s Reptilian: It’s how long the jurors want to live – and the only way that they get to live that long is if everyone else does. That’s on their internal blackboard.

Last year I represented a 72-year-old. The defense says, “The life tables say she’s going to die.” I argued that the jurors are the experts on life, that what counts is their idea of how long she’s going to live, not some tables. In the focus groups they all said 90 and in trial they did too. I asked them later how they calculated the damages; they used the difference between 72 and 90, which was the years the defense said he’d be dead.

RAT-KILLING WITH WHICH-WAY-DO-YOU-LEAN? QUESTIONS⁸

One of the great uses of which-way-do-you-lean questions in voir dire is to identify the rats you can’t live with. I call it rat killing.⁹

In voir dire I shut up. I want the jury to talk, not me. The more I talk, the less I learn. I want them to deliberate right in front of me. I want them to audition for my jury. So for example, let’s take when the defense tells you in negotiation, “We’re going to stipulate and keep all the bad shit out, and the jury’s going to give us bonus points for stipulating.” And that’s really why they’re doing it; it’s not out of the goodness of their hearts. They expect the jury to cut them a break. So take that away in voir dire. “Some folks think that when a defendant admits fault, it should make the verdict lower. Other folks think admitting fault should have no effect. Which way do you lean?”

Then I’ll pick somebody that looks strong, willing to talk. I’ll say, “All right Mr. Jones, tell me about that,” and he’ll start talking. Then I go to someone else and say, “Ma’am, you lean the other way. Please tell me about that.” Go back and forth between them once or twice. Tell them, “Give the other one your best shot,” and then it only takes going back and forth between two of them to get ten minutes of pure deliberation – because your mouth is shut. You’re not saying a word.

Then more hands go up. Other jurors want to join in. So you get more deliberations, all the while without a single comment from you. That’s hard for us because we’re attorneys, but we have to do it. It’s even harder for David because he’s never heard a sentence he didn’t think¹⁰ needed interrupting.

8 See *Reptile*, Chapter 10; and *Damages* 3, p. 64, 65.

9 See *Keenan Edge*, 221.

10 **Ball note:** What, me?

Now it's rare, but what if someone says something that changes other jurors' minds? You didn't do it – you can't. But once in a while they do it to each other. So one of them might say, "Why should the verdict be lower just because the defendant admitted fault, which they should do anyway?" And that can bring others on board. So now I finally talk: "A little while ago you said you'd lower the verdict, now you're saying it makes no difference. How many of you will let it make no difference no matter what you said before? And how many of you will let it make a difference?" That separates out the adamant rats. Try for a cause challenge: their stance is against the law. Don't expect them to change their minds: if they haven't changed now in voir dire, they never will in deliberations. Get rid of them. If they're a leader type, they have to go.¹¹

Later I've gone to the defense table and I say, "All that stuff you said in mediation ain't gonna happen; they've pledged to ignore it. And you know what I suspect they're gonna do? The minute they hear you talking about cutting you a break because you stipulated, they won't just give us full value, they'll double it."

Last time we did that, they paid policy limits the next day. I wish they've done it the first day so we could've gone home.¹²

CODE¹³ FOR LAWYER

Part of the reason the Code for lawyer says we're liars, braggarts, condescending, slimy, pushy, manipulative, and so forth, is that a lot of lawyers are and have been. You have to show that you're something else. So for just one example, stop telling jurors what to think and do. Lay out the dots for them, sure. But empower the jurors to connect the dots for themselves. Decades ago, Moe Levine taught us the importance of this and how he did it.¹⁴ He'd say what the standards of care or the safety rules were, but then he'd say, "As the conscience of the community, the guardian of community safety, do you want the safety rules [or standard of care]? What do you want to say to the shop owners in this community about objects on the floor that we can slip on and ruin our lives? What do you want to tell them?"

The constant mistake I see in our workshops and the lawyers I work with is that they want to hammer the nail into the 2x4 with a sledgehammer. How do jurors respond? "For God's sake we're not stupid! Don't keep repeating the same shit over and over and over. And don't tell us what to do! The only one here without a brain is you!"¹⁵

11 See 305 – 307 in *Damages* 3. Failure to spot leaders and know which ones to get rid of can cost you the case, or at least drive damages way down.

12 More on voir dire in *Keenan Edge*, Chapter 10.

13 See Chapter 7, *Reptile*, for explanation of Code, a crucial Reptile tool.

14 TrialGuides.com has an excellent and exclusive selection of Moe Levine materials. Highly recommended.

15 See *The Keenan Edge*, 137-138 and 354-357.

Birth of our Reptile. A top-ranked Republican strategist and well-known advisor to President George W. Bush was my neighbor at the beach; he introduced me to the Reptile and how it worked in politics and marketing. I went and told the Inner Circle of Advocates about it. They said, “Hmm, go study it, report back, tell us what to do.” So I called David Ball. I said, “David, I’m going to talk to you for maybe 30, 40 minutes and do not interrupt me, if you do I’m gonna hang up.” And of course that was an impossible request; the last time David didn’t interrupt anyone for 30 minutes was before he learned to talk. But this time he didn’t. I kept saying, “David, are you still there?” He says “Yeah but you told me to shut up.”

After I laid it all out, he says, “I gotta call you back.” Now, when has David Ball been incapable of giving you an on-the-spot explanation of the meaning of life, the purpose of the universe, or anything else? It scared the hell out of me. He’s gotta think? I said, “Man, you gotta call me back quick.”

By the time he called me back, I’d smoked two Cuban cigars, an hour and a half each. I blew through them both, just chain smoked those things. Then he called back. We decided to prove this Reptile stuff *wrong* – to embark upon a series of research groups across the country to prove this stuff doesn’t work for juries. If we could prove that, then I could leave it alone and it would stop bugging me. It might work great in politics and sell merchandise but it didn’t have a place in our work.

We decided we’d each choose a compadre to help us. I chose Jim Fitzgerald, a fellow Irishman, we came into the Inner Circle together; he’s my soul mate. And David said, “Let me introduce you to one of my best friends, he calls himself a country lawyer but he’s smarter than any lawyer I know. His name’s Gary Johnson.”

So quickly, I mean within a week, we had all four of us in Atlanta kicking around the basics: what is this stuff, where does it come from, how are we going to study it? So for the next two years we did multiple focus groups all over the country in nine different states. Along the way Rick Friedman joined us, along with David’s partner, Artemis Malekpour.

We had to see if this stuff was demographic: Was it going to work on the cowboy in Kansas but not the greased-back black-hair, thin-stripe Wall Streeter or the Fancy Dan in California? We were absolutely sure we’d see differences in demographics. But one of our first revelations was “Damn, there’s no difference.” Gary kept slamming his fist on the table saying, “You got to realize that people are people no matter what their background is or where they came from. The hermit on the mountain and the junior league lady and the Wall Street exec, *they all survive in the same way.*”

When you get to survival level, you have everyone. We fought believing that, tooth and nail – until we saw how true it is. And that was the birth of the Reptile.

Case Selection Checklist. The most important chapter in the Reptile book, Chapter 15, is the shortest. Four pages. Well, two pages, really, because there are two pages

of forms and fill-in-the-blanks. It's called the "Case Selection Checklist." The current version has three questions:

- Who else could have been a victim? (The random victim – it could have been anyone.)
- Why should the juror (and the community) care about this case?
- What shows it could happen again with the same outcome?

We start that form on case intake. Start, not finish, because it's a fluid document. Discovery changes add to it. As we get closer to trial, it becomes more detailed. And right before we work up our order of proof, our opening statement, that form is my Ten Commandments: it's exactly the basis of my Reptile case.

Now this is not as hard to learn as the opening statement, but when we bring the lawyers to the beach workshops, I say, "Pull out your case selection criteria, what's on it?" And I see more blanks than anything else. So I say "We're not doing a thing until we figure out how to fill all this in."

Obviously, one of the things jurors want, what the community wants, is the rule that protects them. There's nothing they can do about your client. He was hit, boo hoo. But in closing you say, "Ladies and gentlemen, if having the rule about traveling a safe distance behind other vehicles is important to you and the community, you have the opportunity to keep it important in this verdict. If that rule is no big deal, then you can say that in your verdict. So what do you want for your community? Do you want this rule or not?" That's one way you make it a Reptile case. Of course it's your job to know your laws and rules and how to argue on behalf of what you want to say. And you need fall-back ways to say it, instead of throwing in the towel if you get an objection.

System-failure analysis. I have become a system-failure analyst. When I look at a case I look for system failure. How did a system fail in a way that ended up hurting my client? How could the failure have been prevented?" And now I am a system-failure analyst with how attorneys do their cases. What are lawyers screwing up on the most? Why are they having problems, say, figuring out how to find and word the Rules? So I wrote down the most common seven things they're doing wrong or maybe not even doing. (See p. 100 and 146-151 in *The Keenan Edge*, or find them at KeenanTrialBlog.com.) Think about them when you're preparing your case. Or when you're trying to figure out why you failed.

KNOW THE LAW!

A good lawyer in the northeast argued the conscience of the community in closing argument. He calls me and says, "The judge is going to take my verdict away," and asks, "Do you know anything about the law around here on conscience of the community?" I said, "Damn, you didn't research it before you embedded it in closing arguments, are

you nuts? Hang up right now and go Lexis-Nexis the damn thing. It'll be there." In a few days he calls and says, "I'm so relieved." I said, "It's my purpose in life to give you peace. You found it, didn't you?" He said, "How'd you know it was there?" I said I really didn't know it was there, but I assumed it was there because it's everywhere except Florida and New York.

So know the law. *Before* you go to trial. Be prepared to use it when the judge wants to stop you from doing something. Have an alternative way to do it in case the judge still says no. And please, if the judge keeps telling you to stop, don't keep going down the same damn path.

RULES IN VOIR DIRE

"Ladies and gentlemen, how many of you drove to the courthouse today? How many of you all had to follow certain traffic safety rules? If you're following the safety rules, what do you expect other drivers to do?"

They answer, "I expect them to follow the safety rules."

I say, "That seems like an unwritten, unspoken deal: I follow the safety rules, I expect everybody else to. Anyone here who does not expect other drivers to follow the safety rules that you do?"

Then I go to the *permission* method: I tell them what I do, and that gives them permission – makes them feel it's easy – to tell you what they do. For example: "I often work late, two or three in the morning. I go home the same way I've been going home for 30 years. On the way is a traffic light. Now at three in the morning nobody's on the road. But I stop. I admit I feel a little silly stopping. Now, any of you share that with me?"

Someone answers and says, "Yeah, there's this stop sign, we've been trying to get them to take it down, it's silly, it doesn't need to be there, but I stop anyway."

Someone else says, "Let me tell you about the how silly it is to follow the rule I have to follow. . . ." and four, five, six people say the same thing.

Then I pick somebody and ask, "How come we all follow it if it makes us feel silly? What's the point?"

And some of them say, "There are no exceptions to safety rules. How do we know nobody's out there even once out of a hundred times?" So I ask: "Some people say, 'No matter what, you always have to follow the safety rule.' Others say, 'No, not when it's silly like in the middle of the night and no one's out there but you.' So let me ask you all, 'Which way do you lean?'"

The ones who say you don't always have to follow the rule are likely to give the defendant a pass.¹⁶

16 **Ball note:** You can learn a lot about such jurors by asking when it's OK to violate the safety rule and when it's not. And get the jurors talking to each other about it, as Don teaches above.

That way, when I get to the Reptile opening, everybody responds the way I want them to. They know within two minutes of the start of my opening that the defendant broke the rule. “Damn,” they think. “I depend on people to follow the rule. This is an immediate danger to me, so I’m not giving him a pass. We just got through talking about this in jury selection.”

And you’re only a minute or two, maybe three, into your opening.^{17, 18}

CASE LAW AS YOUR BEST FRIEND

Don’t forget your case law. It’s full of great Reptilian stuff. Such as, “The degree of care should be commensurate with the danger.” That’s all over the place. It defines negligence.

I’m doing some electric power line cases in South Carolina. Listen to what a South Carolina case says about power companies. “The rattlesnake warns its victims but not so with this subtle invisible and death-producing power. It is a matter of common knowledge that this wonderful force is of untold benefit to the expansion of our industrial life in the south. Yes, electrical power is an industry-producing agency and the hydroelectric development has been one of the greatest factors in this state’s progress and especially in its industrial expansion. Every legitimate encouragement should be given to its manufacturer and distribution for use by public utility corporations, manufacturing plants, our homes, our courthouses, and everywhere. On the other hand, the highest degree of care should be required of this power company distribution of its deadly energy and in the maintenance and inspection of all of its instrumentalities and appliances used in transmitting this invisible, highly dangerous, death-causing, subtle power.” (*Ellis v. Carolina Power & Light Co.*, 103 N. C. 357 S. E. 163, 166). Remember, it starts off as the rattlesnake sends the message; the electrical power lines do not.

Never forget case law. The Reptile will thank you.

A little help from people who are not always our friends. “The easiest pain to handle is the pain of someone else.” Who said that? The American Medical Association. They want it taught to all doctors. They want their doctors to understand it when their patient is in pain and the doctor’s saying, “Well, so is everybody else around here.” It’s a beautiful, empathetic realization that no matter what the pain, it means a lot if you’re on the receiving end.

And where else does someone say that? The Bible.¹⁹

17 **Ball note:** Don is referring to the Reptile method of opening state described in *Damages*, Edition 3 (TrialGuides.com) and in the training DVD, *Reptile Opening Statement* (Reptile KeenanBall.com).

18 See *The Keenan Edge*, 210-210.

19 **Ball note:** See *Reptile* Chapter 14 for the many ways you should use Scripture, along with Keenan’s advice about how to use Scripture without offending anyone.

PAIN AND SUFFERING

Pain and suffering used to be a safe phrase. But now it can play right into tort-“reform”: this is a lottery, we’re ambulance chasing, we’re making a big deal about nothing, frivolous case, and all that. And on TV there’s always some lawyer holding a big check the size of a mobile home yelling, “Dollars for your pain and your suffering!”

You can do one of two things about this. Either don’t use the phrase “pain and suffering” – though that can be difficult when it’s in your jury charge²⁰ – or overuse it. Desensitize jurors to it.

When I was a puppy lawyer I was defending some guys accused of illegally running a strip joint. I hired the National Jury Project because, back then, they were the only ones doing focus groups. They looked at the results – unanimous for conviction – and they said, “You have to desensitize the jury. Because the police, they’re going to talk about the revealed private parts and it’s going to shock jurors, no matter who they are. You have to desensitize them, so use the words – nipple, pubic hair, vagina, clitoris – over and over during trial. That makes those words no big deal. You desensitize the jury.” So I did. It worked.²¹

In the same way, you can desensitize the jury by saying “pain and suffering” all over the place, every single witness. Opening statement, voir dire, and pain and suffering here, pain and suffering there, pain and suffering everywhere.

A NOTE FOR CLOSING

“Ladies and gentlemen, we’ve talked about safety rules. We’ve had experts on safety rules. The case began with your knowledge about rules, and the importance of rules. You quickly learned that you have to follow the rules for jurors. Just like the lawyers have to follow the rules for lawyers. You learned that when you’re called to serve on a jury, the rule is that it’s your duty. Just like soldiers have their duty, you have yours. It’s a rule. It applies to you. And there’s a rule that when you take an oath, you’ll do justice.

“There’s a rule that we lawyers have to stand up when you walk in or when the judge walks in, out of respect to show that we all embrace the rule of justice.

“There’s a rule that during trial we lawyers can’t talk to you, can’t even hardly look at you in the hallway. When you’re coming down the hallway in the morning, I want to say good morning but the rule says no, so I don’t.

20 **Ball note:** Even if you decide not to use it until closing, you still can use it in jury voir dire as part of lowering the threshold to getting the bad answer. See *Damages* 3, 296-299.

21 **Ball note:** In another criminal case, some North Carolina folks in a small town were selling XXX porno videos through the U.S. mail. Did it meet the local test of obscenity? Well, that was up to the jurors. So the defense showed so much of the XXX stuff that it desensitized the jurors into feeling it was no big deal. The sting disappeared. Result: defense verdict.

“So far, you’ve followed your rules. I’ve followed my rules. And isn’t it ironic, even sad, that the reason we’re in this courtroom is that the defendant broke, violated, chose to violate, the most important rules of all? The safety rules. Not just rules, but rules that protect us.

“So here’s what’s called the rule of responsibility: When a defendant does not accept his responsibility, then the rule says it’s your responsibility to make the defendant accept his. Why? Because as long as it’s up to the defendant, he’ll never do it. So the law says it’s no longer up to him. Now it is your rule, your responsibility to make them accept their responsibility – and put an end this. Put it to rest. Bring closure. Make it right! Make this community safer.”²²

AGGRAVATION

Some jurors have trouble with the term “aggravation.” They think it means something minor: to annoy. They also have trouble with the concept itself. “He was already hurt so why should the defendant have to pay anything?” So in voir dire, ask:

“Who knows any adult without any physical problems? No back problems. No aches or pains. No nothing. In perfect condition. None of what we call a ‘pre-existing problem’ – something you already have. Who knows anyone over 25 without a single pre-existing problem?”

If you’re human you have something, so not many hands go up.

“And how many people do you know well who do have any kind of preexisting problem?” If you have enough voir dire time, follow up by asking jurors to tell you about the pre-existing problems among people they know well. There will be many.

Then ask: “Anybody here with no pre-existing problem of any kind? Anyone?”

To the few – if any – people who raise their hands, say something like, “Great! The rest of us envy you.”

Then ask: “Now, sometimes someone violates some safety rules and hurts a person with one of those pre-existing problems. Permanently ‘aggravates’ – makes the pre-existing problem worse. When that happens, some folks feel the rule violator should pay nothing, because the pre-existing problem was already there. Other folks think the rule violator should pay for whatever amount of harm he added to the pre-existing problem. Which way do you lean?”

Follow up with “Tell me about that.”

The jurors will almost all tell you why it’s fair for the defendant to pay, even if they’d never thought about it before.

22 **Ball note:** Remember, it’s up to you to determine whether your venue allows you to say, “Make your community safer” (or anything else). Know the law, have alternatives – such as, “It’s up to you to enforce the community’s safety standards.”

After the jurors have all had their say, ask: “I asked about that because in this case, you’ll be required to decide on a dollar figure for the amount that the defendant’s negligence made a pre-existing problem worse. Mr. Defense attorney agrees that when a defendant makes a pre-existing problem worse, you decide on a dollar figure for it. At the end of the case, Her Honor will tell you it’s the law. So knowing that, Mr. Juror [ask those who had trouble with it], what kind of trouble would you have, even a little, following that law?”

You can’t live with jurors who’ll have trouble doing it. They won’t change their minds. They’re off. But follow up their answers so they’ll talk themselves off for cause. Search keenantrialblog.com for “Rat Killing Voir Dire” for questions that set the juror up for disqualification. Use just one for each such juror; there are six or seven so the jurors can’t get ahead of you and squirm out of it.

Tell your doctors that the defense will make it look like your client, their patient, is the only person in the world with pre-existing problems. Ask your doctors – in advance and on the stand – if that’s true. “How many of your patients have had pre-existing problems made worse by something that happened later? Does that happen with old patients? Young patients? Male? Female? Kids?” He’ll answer, Yes, yes, yes, yes and yes.

In voir dire, ask what percent of Americans the juror thinks have some kind of pre-existing, permanent problem. You normally get “almost everyone.”

Then ask, “What percent of the population over 25 do you think has pre-existing problems that have not yet started to cause pain or discomfort?”

During your doctor’s testimony, ask the same question: “What percent of the population over 25 has pre-existing problems that have not yet started to cause pain or discomfort?”

The answer is almost everyone. Almost 100%!

In other words, take Gary’s judo-law method and run with it. Grab that pre-existing problem right out of the defense’s mouth.

Bad venues. You say you have to practice in a terrible venue? Well, we all do. Great places to live but nobody wants to file a case on the panhandle of Georgia, or Gulfport, or Texas, or Charlotte, or Fort Smith, Arkansas, or 100 miles outside of St. Louis, or Pikeville, Kentucky, where Gary Johnson is. You can now get great verdicts in those places because Gary and our other Reptile lawyers in those so-called bad venues went in front of those very, very conservative, terrible venues, where the Taliban and All-state was lying in wait. The Reptile has changed that. So now we know it does no good to complain about a bad venue. Instead, apply the Reptile and there are no bad venues.²³

23 **Ball note:** Once you have mastered the Reptile, you’ll be astonished to find that tort-“reformed,” conservative jurors will usually be your best jurors.

Even DRI – the Defense Research Institute – teaches that there is no longer any such thing as a terrible venue for plaintiffs. The only thing now that makes a venue bad is when your mindset says it's bad – it's a self-fulfilling mindset. So get it out of your mind. Look what some of the folks in this book have done: Don Cheney with his million dollar verdict – twice! – in terrible-venue Arkansas. Get out of this mindset that your people are not like the rest of the country and somehow can't do justice. It just ain't true, so if you use it you're only making excuses that, with the Reptile, no longer hold water.

OPENING

Artemis Malekpour, David's partner, writes later in this book that when it comes to opening statement, there's no leeway. And that's true – except for one part which I do differently, and with David's and Artemis's blessing. They prefer giving a dollar amount, when allowed, for non-economic damages at the end of opening. I prefer to say at the end of opening, "We don't need you to total up the lost income and medical expenses. Eighth-grade math class can do that. What we do need you for is to put a value on the most important harms, the greatest harms in the case: the mental anguish, the change in the quality of life, the sleepless nights, the worry, the anxiety, and the physical pain. All the things the judge will instruct you about at the end of the case; they are the most important harms. And you are the most important experts on that, because you are the experts in life. You're all from different backgrounds; you've all suffered the hardships of life, the betrayals, and the tears. So at the end of the case, when it comes to the real damage, the worst harms, we'll talk about how much the verdict should be."

I say that at the end of opening, and it prepares them for the big number at the end.

MECHANISM OF INJURY AND VISUALS

Artemis and David also write about the mechanism of injury, one of the most important parts of opening. What you say and how you say it are crucial. But you must also show, not just tell, the mechanism of injury. That's one reason David, Artemis, and I have been working closely with High Impact graphics in Colorado,²⁴ our go-to visuals firm for anything Reptilian. High Impact is the only graphics firm that has learned about the Reptile from long hours with David and me.

No matter how well you tell the mechanism of harm, it is ten times more effective when you show each individual step with a clear, simple, visual. Each one proves what you are saying, so you stay off-Code.²⁵

²⁴ <http://www.highimpact.com/>

²⁵ **Ball note:** If you don't know the all-important concept of Codes, you have forgotten a crucial part of the *Reptile* book (Chapter Seven).

And then two things happen. First, they get it. They know the mechanism and therefore will believe the injury that follows. Second, you're a step closer to being the credible messenger, the believable teacher, way off the damning, damnable Code for lawyer.²⁶

BALL ON KEENAN'S CLIENT PREPARATION FOR TESTIMONY

Our first publication after the Reptile book in 2009 was the DVD of Don Keenan's brilliant method of witness (client) preparation for deposition and trial. In my (David's) opinion, this DVD is the single best publication ever put out for trial lawyers. I say this as someone who has put out many of both. I enthusiastically yield first place. After all, which witness do you have the most control over, can spend the most time with, can have the most effect – for good or bad? It's your client, who has a vested interest in spending time with you, who wants to be a good witness, and who wants to get rid of his fear of the upcoming task of testifying.

HERE'S DON'S STANDING GUARANTEE

If you fully follow the DVD, your client will be your best witness in the case. If not, you get your money back – even when it comes to the client you hate and think cannot be made into a decent witness. The DVD has been out since 2010 and so far no one has had reason to ask for their money back.

BACK TO DON

Non-permanent injury. If you don't ask this next question in voir dire and, as a result, the wrong jurors get on your jury, you'll lose. You cannot turn these people around.

"In cases like these, jurors have to make some decisions about a person who has completely recovered from injuries a defendant's negligence caused. Now, some people believe that even if the person is completely recovered, he should get money for medical bills, lost income, and for the interruption in her life, the anxiety of whether she'll get better, the terror it will happen again, the inability to sleep, and the mental and physical suffering.

"Other people believe that since she's now all better, the problem is over so she should get money only for medical bills and lost income. Nothing more. Which way do you lean?"

Usually you'll get 20% leaning towards "nothing more." Follow up, and the judge should get rid of them for cause. If not, place them high on your peremptory list (especially leaders). They are not going to change their minds.²⁷

26 See *The Keenan Edge* on Demonstrative Evidence.

27 **Ball note:** When a juror seems to be a leader, he is dangerous unless you're sure he'll be on your side.

CLIENT IN COURTROOM?

I don't get a vote. I ask the jury. That takes me right off Code. The question is demonstrated on the Reptile Voir Dire DVD so you can see how people respond to it.

"Ladies and gentlemen, I have a decision to make, and I need your help. I've got a catastrophically injured woman. She'll never walk again, she'll never have a good memory again, she gets anxiety just being around strangers, and she gets worse anxiety when she hears people talking about what happened to her. We have her doctors coming to tell you about her. Her family, her friends and other people who know her, will be here to tell us about her. But here's where I need your help. Do I bring her into court? Her doctors say that would be bad for her. But you have a right to see her if you want. After all, we're asking for a lot of money, so no matter what her doctors say, you have a right to see her. So you tell me what you want me to do."²⁸

I've never had a judge stop me from asking that.

Or I might say:

"My client is perfectly fine today. She's back to work, everything's fine. But she does not want to have to re-live all this. It'll be a second injury. That's my client's choice, but you're the boss. You want her here? I'll get her."

They almost always decide you can leave her home. But if they talk back and forth about it – deliberate in front of you about it – and decide she has to be here, you have to live with it.

28 **Ball note:** You don't want your client in trial when she looks far better than she really is. As such, she's a dangerous visual exhibit against you. This is especially true with brain-damage clients. If you are forced to have her there, have an early medical expert explain how she can look so well despite her real condition. And include the fact that she looks fine as one of her worst problems. See pps. 194-197, *Damages* 3.



GARY C. JOHNSON

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CHAPTER TWO

Judo Law, Pre-existing Conditions, and Other Necessities

CLIENT CREDIBILITY

MIST cases have a long history of propaganda that people are trying to get something for nothing. A low impact case is perfect for the jury to conclude your client is after something for nothing. You can't win if that's what the jury thinks. So your first and most important task is to make sure your client is credible. That's the number one Reptilian task.

MEDICAL FIREWALL

Prepare your client for his deposition by gathering all his past medical records and summarizing them. He needs the summary at his deposition. Cases are lost in the client's deposition because no client can remember everything in his past medical records. So the defense will ask if he's ever complained of neck pain. Your client will say never, because he's forgotten. Or he thinks it's bad to admit it. So now if there's a medical record of neck pain 10 years ago, credibility is gone. Case over.

Make sure you get all the medical records. Gather all the records of every doctor and hospital your client remembers. Then scrutinize those records for all mentions of other doctors and hospitals. Then request records from every source identified by the client or his records. This can take time, but again, in a MIST case, it's do or die.

Summarize the records of all relevant past medical treatment. Give the summary to the client to take to his deposition. Provide a copy for the defense and attach it to the deposition, even over their objection. Then the defense cannot say the client tried to hide a past medical condition. This is not optional. Do this, or you are likely to lose for an easily preventable reason.

Once you've got all the records, summarize them chronologically. Make sure to include every neck and back entry, and anything else that could be in any distant way relevant to your client's injuries. The summary must be 100% comprehensive and accurate. If you leave a hole, the defense will find and use it.

CRASH FIREWALL

Your client is going to believe that he must give an answer to every question. So the defense will ask, "You saw the defendant in your rear view mirror?" "Yes." "How long was

it from when you saw her until she hit you?” The client, who has no idea, will invariably say something like, “A minute.” And that’s where you lose, because if it had been a minute (or even a few seconds), your client had time to get out of the way.

Your client said “a minute” because he thinks he needs to give an answer. Explain to the client that he must not guess or estimate on anything. It’s OK to say “I don’t know.” It is so simple for the client to repeat over and over “I don’t know. It was so fast there was nothing I could do.”

Time, speed, and distance are fertile ground for the defense. A client never gives an accurate answer to any of these. The defense will still try to pin him down, to make him stumble into the easy trap of giving an answer when he doesn’t have one: “Well, how far away was she?” Your client says, “Well, maybe 10 car lengths, or maybe 20.” The answer is always wrong. Make sure your client knows it is OK to say something like, “I don’t know, I didn’t measure. She was so close there was nothing I could do.” And that’s the truth.

The defense will also ask, “Where were you sitting? How were you sitting? Where were your feet?” Nobody can remember that. So if you haven’t made sure your client knows he can say “I don’t know,” he’ll give an answer and it will always be the wrong answer.

If your client guesses during his testimony, the defense will feed these answers to his expert: “OK, the plaintiff says 10 car lengths, how long did that give the plaintiff to get out of the way?” “More than ten seconds.” If you let this happen, you lose.

JUDO LAW

Years ago I learned that every fact – good or bad – can be a double-edged sword, depending upon how that fact is presented the first time. You can take the worst fact in a case and turn it around, as you’ll see below with pre-existing conditions. The goal is to judo what used to be the bad – the terrible – fact of pre-existing conditions and made it our best fact. You can do the same with almost every bad fact.

Since we get to present first, we can set the stage in opening. You flip the facts the defense is going to use against you; make them yours so they actually bolster your case – so that you’re glad that formerly bad fact is there. Sometimes it’s not easy to find the way to do this, but I’ve never found a fact I couldn’t flip if I thought about it long enough. No matter how bad, you can flip it.

But be careful: your *good* facts are also double-edged, unless you build a wall around them. Otherwise the defense may flip them on you.

JUDO LAW AND PRE-EXISTING CONDITION

Eventually just about everyone is in a wreck, including your jurors. The vast majority of people didn’t get hurt in their wreck. If they did, they healed quickly. That’s the norm. People can be in low-speed, low-vehicle damage wrecks and not get hurt, and that’s the majority of these wrecks. That’s why many jurors will never believe your client could be hurt in a low-impact crash.

In my opinion you can't get around this lifetime experience unless your client has some degenerative disc disease or other pre-existing condition that makes him more fragile than the juror. The pre-existing condition explains why the wreck hurt your client even though the jurors' wrecks did not hurt them. So when the defense doctor says, "This plaintiff had a previous neck and/or back problem," he has just made my case. I can now explain why this wreck hurt my client. Use the defense doctor to teach the jury that sooner or later everyone is going to get degenerative disk disease. It's part of the normal aging process.

That's where the Reptile comes in: Even though juror number three was not hurt in his low-speed wreck, he now knows that as he develops his inevitable degenerative disk disease, the wreck that did not hurt him before will hurt him next time. You have turned the strongest defense argument into a strong tentacles-of-danger argument.^{29, 30}

Then connect that to the powerful Reptilian fears of not being mobile, of being alone, of not being able to get home or out of your home.^{31, 32}

In every state in the Union, the law recognizes that people have infirm conditions, medical conditions, and pre-existing conditions. These people have a right to be on the highways. They are not forbidden to drive or be a passenger. The law says that anyone who violates the safety rules and causes injury takes their victim "as is." The rule violator is responsible for all the damage he does – even though the victim was fragile. If that was not the law, then people would not be allowed on the highway once they have a little age on them. By the time we're 50 (or younger), we all have degenerative disc disease. Most people go through their entire lives and never experience pain from it. But a blow to the neck or back can disrupt what nature has been doing to prevent the pain. And that doesn't take much force. You'll have jurors who will have heard of people standing up quickly and herniating a disc, or rolling over in bed the wrong way and herniating a disc, because of their pre-existing conditions.

The defense doctors help you every time. They'll tell you how horrible the pre-existing condition was even though it didn't hurt before. You judo-law that into your strongest argument. When the defense doctor says – as he always will – that your client's medical problems stem from a pre-existing degenerative condition, you can have your doctor expert – or the treating doctor – testify that "Yes, the Plaintiff had a pre-existing condition that the crash aggravated and turned into chronic pain." If you've established and protected your client's credibility, when he says "I've got excruciating pain now that I didn't have before," the jury has reasons to believe it. You're home free.

29 See *Reptile*, 58-60, and *Damages* 3, p. 142 footnote 8.

30 See *Keenan Edge*, 295-298.

31 See *Reptile*, 78 and 88.

32 See *Keenan Edge*, 133.

BAD CONDUCT

You need bad conduct to drive a verdict. Bad conduct can come from three places: (1) the acts of the defendant, (2) the acts of the defense attorney, and/or (3) the acts of the defense doctor. You can always get bad conduct from at least one of these.

In other words, just being hurt is not enough. “So the defendant made a mistake and someone got hurt, so what?” Jurors need bad conduct to make damages acceptable. Without bad conduct, they come up with the most creative ways in the world to go into deliberations looking hard for socially acceptable ways – excuses – to give you no money. They don’t do that when you show them bad conduct.

Most jurors would do just about anything to keep from being involved in a lawsuit. Your clients would do just about anything to keep from being involved in a lawsuit. They come to you only when they have absolutely no other choice. The jury needs to understand that. For example, ask your client during testimony: “How do you feel about this? How do you feel about being here in this courtroom? How do you feel about having to come to see somebody like me?” You’re setting the stage to show that the defense forced your client to go against everything he believed to be right, by filing a lawsuit. The defense *forced* him to go through the emotional trauma of it, the indignity of it, the humiliation of it, the invasion of privacy that a lawsuit makes necessary. The defense forced him to come to the courtroom. They forced him to spend money.

When it is clear what they did, what they caused, and what the damages are, the defense is frivolous and you need to tell the jury why. You point out in closing that though the defense says the wreck was unintentional, everything they’ve done since the wreck – which includes forcing the filing of the lawsuit – has been intentional. They hire a doctor to call him a liar. They insinuate your client is trying to get something for nothing. They force him to spend thousands of dollars to have his day in court. You bolster your damages by showing that their conduct in defending the case is unacceptable. That’s why they should have to pay every single dime of the damages they have caused.

In dealing with the cost to your client in preparing the lawsuit, the defense will help you. The defense always asks how much your experts are being paid. Judo that back against the defense. I have my experts testify how much they’re paid. And I ask them if they’d be here if they weren’t being paid. They say “No.” This helps set the stage for closing when I can make having to file the lawsuit itself a damage.

In other words, what did George have to spend in order to bring the defendant before a jury and make him accountable for the safety rules he broke? “Look at the costs George had to spend to deal with this frivolous defense.” Juries have no idea how much it costs to put on a lawsuit. Make it part of your case.

If the defendant had come forth and accepted responsibility, George would not have had to spend the money he did. But it’s not just the cost to George; it’s also the cost to the community: judges, juries, and court personnel all cost the state money. Who pays the state? Taxpayers. Who are taxpayers? The jury.

Credentialing your client. You have to find something in your client's life that makes him worthwhile to society. It doesn't have to be a big thing. He works, pays his taxes, and feeds his kids. You need something to show that the client is a worthwhile human being. I call it *credentialing*.

If a person is worthy, then a jury is OK with him getting a lot of money. Otherwise jurors will say, "Why give him money? It won't last him a week. He's just going to kill himself with it. He won't do anything with it except cause trouble." They'll dream up a thousand reasons to keep this "unworthy" person from getting money. But when you've credentialed your client, jurors who would otherwise ignore the law will follow it.

"THE DECISION HAS ALREADY BEEN MADE"

Tell the jury, "It's not your responsibility to determine whether my client is actually going to get a dime of your verdict, and it's not your responsibility to worry about what is going to happen to the verdict after you render it. Your only responsibility is to write down the amount the damages the law requires, no more and no less, based on the evidence you heard during the trial. In other words, you are to find a fair appraisal of George's damages. If George gets this money, that's fine. And if George gets it and decides to take it to Vegas and waste it all in a week, that will be his choice. It has nothing to do with your appraisal of the damages."

Now you might ask why I'd want to put that thought – about Las Vegas – into their heads. But I'm not. It's already there. So why tiptoe around it? Deal with it and take care of it. Tell them the law makes the decision for them and they don't have to burden themselves with wondering what will happen after the verdict. I believe the Plaintiff's bar makes a big mistake when it doesn't give jurors credit for their intelligence and wisdom. Jurors know what's going on. They're not stupid. If I'm thinking something, they are too. So, for example, I tell them early "I'm here for money; it's the only reason I'm in the courtroom." This is called incongruity – doing something they don't normally expect. It's a great way to persuade, because it lowers their guard. So when you say something so true that they'd never dream you'd dare say it, they start listening – really listening – to what you're talking about.

Most people on that jury have never made a significant decision in their lives. They avoid it even when the opportunity arises. It's painful to make big decisions. It can cause failure. It can be hurtful. It can be embarrassing. It is far easier to let someone else make the decision for you. So you explain that the law has already made the decision: "If you just follow the jury instructions, they tell you what to do. So if you find George got hurt and it's the Defendant's fault, then the jury instructions say this is what you are to do. Here's the medical expense. More likely than not, here's his future medical expenses. Here's the lost wages he's had." I try my cases so that there are no decisions for the jury to make that the jury instructions haven't already made for them.

PAIN AND SUFFERING MONEY

You must then consider how to approach the subject of pain and suffering with the jury. Ask for a whole lot: “George wouldn’t have taken any amount of money to be put in this position. Not ten million, not a hundred million, his health was not for sale at any price. But George isn’t asking for a hundred million, much less ten million. He is asking for one million which he believes is reasonable.”

The jury is less likely to give you money for pain and suffering than they are to use pain and suffering as a way to make your client whole. That’s because the jury is not stupid. They know that there are costs (because you just told them). They know there are attorney fees.

How does your client break even on his specials? Where does the money come from? With a little help, the jury will understand that a verdict for pain and suffering money is the only way for your client to break even from the lawsuit.

In other words, you show that it’s worth a zillion dollars, and then come down and ask for something reasonable. “Reasonable” will generally be what it takes to make the client break even. When you do it that way, you automatically anchor your reasonable amount as the juror’s reasonable amount.

When approached this way, I’ve never had any problem getting a jury to allow money for pain and suffering.³³

DEFENSE MEDICAL EXAMINATION

It takes about five minutes to prepare a client for the defense doctor’s examination. I tell the client to do anything the defense doctor asks him to, if he can. If the doctor tells the client to do a cartwheel, the client should do a cartwheel, if he can. I say, “You’re going to go see the defense doctor. He’s not going to find anything wrong with you. I double dog dare you to try to convince him there is. If he tells you to turn your head and rotate it 180 degrees, you rotate 180 degrees if you can. If he tells you to do jumping jacks and you can, do a jumping jack. If he tells you to tip toe, squat, or whatever else he asks you to do that you are able to do, you do it. I don’t care what that is, because no matter what you show him you can do or not do, he will not find anything wrong with you.”

Then I tell my client, “I can live with him saying there’s nothing wrong with you. I can’t live with him saying you were dishonest. And he will testify you were dishonest if he asks you to do a maneuver you said you couldn’t do and then later he tricked you into doing it. He’ll testify that you were dishonest if he follows or observes you going to your car and watches you doing the very maneuver you just said you couldn’t do.”

I then again provide my client a summary of his past medical records – the same summary he took to his deposition. I tell him to give it to the defense doctor. And if the

33 Also see *Keenan Edge*, 364-365, for ways to ask for money, and the multiple strategies throughout *Damages 3*.

doctor insists on asking about past medical problems, I tell my client to read directly from the summary. I tell the client that if he doesn't do this, the defense doctor will say he lied in some way about his past medical history. It's a normal defense doctor tactic. I've had defense doctors refuse to take the summary, and then they testify the client tried to withhold information from him.

I then again emphasize to the client that the defense will not find anything wrong with him.

It does not matter that the defense doctor says nothing is wrong with your client. Again, juries aren't stupid. Juries know that the doctor has been paid to say there's nothing wrong with the client. *The only time a defense doctor has any effect in a verdict is when we let our client's credibility be lost.* That's when the jury can use the defense doctor's testimony as a socially acceptable excuse for the jury to roll your client out of the courtroom with nothing. Otherwise jurors pay no attention to defense doctor testimony.

Here's how to handle the defense doctor's testimony at trial:

Doctor, George was cooperative with you?

George did everything you asked you him to do?

Doctor, looking at your report, I see that you didn't say anywhere that you thought George was exaggerating or malingering during your examination.

George told you he was hurt in the wreck?

George told you he has pain?

Doctor, I believe the medical literature states that a person can have a completely normal neurological examination and still have pain?

So if you believe George, would you agree based on reasonable medical probability that he was hurt in this wreck?

Doctor, again, if you believe George, would you agree based on reasonable medical probability he's still having pain from this wreck?

And Doctor, if you believe George, would you agree based on reasonable medical probability that his injury is now chronic?

And Doctor, if you believe George, would you agree, based on reasonable medical probability, that his injury meets the classification under the AMA guidelines to be a permanent injury?

You don't care what he says in his answers to these questions. A yes or a no is equally beneficial to you. If he answers yes, quit. If he answers no, continue with these bias questions:

Doctor, this defense attorney paid you to do this exam?

How many of these exams do you do in a month?

If the Doctor hedges on this question, I probe and ask how many he has done in the past week or even that day. Further, I don't use the term "defense exam" – or in other cases, workers' compensation or Social Security exams. You have shown that the defense attorney paid for the exam, so it's a defense exam. So when you ask how many of these exams the doctor does, you're including workers' comp, Social Security, and so forth without saying as so. And the doctor gets paid a lot more for a car-wreck exam than for workers' comp or Social Security, where he never gives a deposition. Your goal is to get a large figure for the jury to see that this doctor makes per year from these exams.

Right after establishing the number of exams, ask a couple of innocuous questions such as number of years he has been doing exams, etc. to break up the testimony. The goal is to distract the doctor from attempting to qualify his answer about costs by comparing the cost of the current defense exam with those he performs for workers' comp or Social Security.

Then return to the bias questions:

Doctor, how much have you been paid for this exam?

Doctor, how much have you been paid for this deposition?

The best answer for us when asked how much he makes yearly from these exams is "I don't know." If there is one thing the jury knows, it's that we all know how much money we make. So "I don't know" firmly establishes this doctor as a liar. If the doctor gives you that great "I don't know" answer, shut up! Sit down! Then in closing, do the math. For example, if the doctor says he does ten exams in a month and charges \$2,000 for my client's defense exam, then that is \$20,000 a month. If he further testifies that he charges \$1,500 for a deposition, then I can assume he does a deposition for every case and calculate \$15,000 a month for those. Using these figures, I can calculate a yearly income of \$420,000 based on his testimony. In my calculations, I now assume that all exams performed are "defense examinations" and I call them defense exams. Most doctors do far more than ten exams a month.

It is judo law. You make the defense doctor yours through your client's credibility. And you anger the jury by establishing the doctor's bad conduct.

ON THE HEAD OF A PIN

You have to put your case on the head of a pin and include only what I call the determinative facts. Determinative facts are those facts which let you win. All other facts are irrelevant, even if they are lies. The defense has to try to shift the facts to where they stand a chance of winning. They are ingenious at that. They'll deliberately lie to provoke you into a fight. The defense knows that the jury doesn't know which facts are important to your case. The defense also knows that the jury can decide that you lose on a fact that has nothing to do with your case. An irrelevant fact (a "rabbit") can become

determinative if you fight with the defense over it. That makes the jury believe it must be important because so much attention and effort have been focused on it. That turns an irrelevant fact into the reason you lose.

So if the defense interjects all these facts that have nothing to do with my outcome determinative facts, even if they are lies, I don't care. I agree with them. "So what? I agree. You're right." Even if it's a lie, I'll agree because it's not a determinative fact. I spend all my time focusing on the facts that let me win. I don't chase rabbits. I don't chase facts if they're not 100 percent relevant to the outcome of my case.

If a lie is about something which is outcome determinative, deal with it. My experience has been that catching a defendant in a non-determinative lie does you no good. After all, jurors expect the defendant to defend himself from that greedy trial lawyer, so they're forgiving of the defense's lies. The jury doesn't hold it against him. But with a crucial determinative fact, if you can show the jury that the defense has lied, you may very well ring the bell.

The standards concerning lies are different for the Plaintiff and the Defendant. If the jury catches your client in a little white lie (such as the type of make-up they use), even if it's a non-determinative lie, the jury will find against your client. All is not as equal as we'd like.



RICK FRIEDMAN

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³⁴ One of the main gears that allow the Reptile to do its work is Rick Friedman's and Pat Malone's landmark *Rules of the Road*, one of the most important and influential trial advocacy books ever written. And for the full treatment of Polarizing, see Rick's *Polarizing the Case* (TrialGuides.com), another of the essentials.

CHAPTER THREE

Polarize the Case: Revealing the Rotten Core of the Defense

Plaintiff's lawyers are getting clobbered in court, according to the U.S. Department of Justice's Bureau of Justice Statistics 2009 report. The survey gives us much to consider:

Plaintiffs "won" about half of tort trials (51%). The median award in these "wins" was \$24,000.

The median award when auto cases were "won" was \$15,000.

Can we agree that most of the plaintiffs and their lawyers who "won" verdicts of less than \$24,000 were not out celebrating afterwards? Can we go further and agree that most of the verdicts below the median were actually losses? The clients' medical expenses and litigation costs were likely equal to or greater than the verdicts. The clients received grossly inadequate compensation for their injuries and their lawyers lost money. That's a *loss*.

That means we are losing approximately 75 percent of all cases that go to trial: 49 percent to defense verdicts and 25 percent to "wins" of less than \$24,000. But it is even worse than that, isn't it? We have all seen or experienced verdicts of \$75,000, \$100,000 or even \$400,000 that are real losses in any true sense of the word. How can you tell if such a verdict is a loss? Look at who is celebrating after the verdict and who has an empty, sick feeling in the pit of their stomach.

It is hard to quantify how many of the above-median verdicts are also losses, but let me offer up my guesstimate: at least 40 percent—though it is probably higher. This analysis leaves us confronting the reality that tort plaintiffs lose about 85% of the cases that go to trial.

An important cause in many of these losses is the plaintiff's lawyer's failure to clarify the defense's true position. Much has been written about our task of telling the story of the case. Of course we have to do that; but that leaves out an important component of the trial – the defense position. The defense position is often intentionally ambiguous, fuzzy, and obscure. We need precision, clarity, and skill to build a house. The defense requires none of these abilities to tear it down.

In a typical rear-end collision admitted-liability case, the plaintiff's position is usually, "I was hurt in the collision, and I'm still hurting." We may have constructed the

plaintiff's story in a variety of ways to help prove these points. We use the tools of expert witnesses, lay witnesses, documents, and photographs to build her "house" – that is, her case. At the end of the trial, we ask the jurors to pass judgment on this house.

In a typical rear-end collision admitted-liability case, the defense does its best to keep us from building the house. Then in closing argument the defense lawyer points to crooked windows, uneven steps, and a leaky roof and tells the jurors they should not "buy" the house. Who would want to buy a house with crooked windows and uneven steps? The jurors reject our house. But we never ask them to pass judgment on the defense "house." In fact, usually the defense makes no effort to build a house. Again, it is much easier to tear down a house than to build one.

The three most common tools the defense uses interfere with our house-building are:

- Real or apparent inconsistencies
- Insinuation
- Dirt

The defense usually uses these together in an overlapping attack on our plaintiff and her case.

INCONSISTENCIES

The defense can make any inconsistent fact, no matter how trivial or benign, look suspicious. The plaintiff testified that he had been earning \$35,000 per year, but his tax returns show \$32,000 per year – he must be lying about his income to get a bigger verdict. He says he drove to the hospital and arrived about 9:00 a. m., but the hospital record shows he arrived at 10:00 a. m. – where was he during this unaccounted-for hour? Seeing a lawyer?

As any trial lawyer knows, inconsistencies are everywhere in the documents underlying a lawsuit. Most are inconsequential and innocent differences in perception or recollection. As the defense lawyer keeps pointing them out, they begin to look sinister. The defense lawyer does not have to weave these inconsistencies into any credible story. He just has to say: "Look at all these inconsistencies. Something's not right here folks. Wish I could tell you what it is, but I know you will do the right thing." ("Don't buy this house.")

DIRT

It is easier to throw mud at a wall than to clean it off. The defense will move heaven and earth to let the jury know your client is divorced, smokes pot, has a criminal conviction, or is a member of any group the jury might dislike. Defense lawyers know that jurors are likely to make illogical leaps from these facts to conclusions about the merits of liability or damages claims. Notice that none of these tactics require the defense to tell a credible story (or build its own "house"). The defense need only keep offering up inconsistencies, innuendos, and dirt to create an uneasy stink in the courtroom. That is enough to defeat most plaintiffs' cases.

TYPICAL PLAINTIFFS' RESPONSES

Explain away the inconsistencies. Work the medical issues harder. Personally attack the defense lawyer. We may need these tactics, but they are often not enough. Remember, ties go to the defense. The preponderance-of-the-evidence-in-favor-of-the-plaintiff cases also go to the defense. Our tactics still leave the jurors with only one choice – accept or reject the plaintiff's "house." And only the most incompetent of defense lawyers will fail to break some windows and put some leaks in the roof of your house.

POLARIZING

The essence of polarizing a case is giving the jury a choice between two houses, the plaintiff's and the defendant's. Stated another way, whose position is more likely true, plaintiff's or defendant's? The challenge is that most defense lawyers instinctively know they do not want to take a position. Calling the plaintiff a liar, for example, feels dangerous to them – and it is. So instead, the defense talks about "atypical symptoms," "inconsistencies," and "lack of objective evidence of injury" and hopes the jurors will draw their own conclusion that the plaintiff is malingering or exaggerating. If you only take away one concept from this chapter, let it be this: **notice when the defense or a defense witness is failing to take a position.** If they have a story or position of their own that they are willing to articulate, then you have something to attack. If they are not stating a position, then **you have to state it for them.**

So, for example, in an admitted-liability case when I know the defense has an IME report stating that my client is "exaggerating her symptoms," I will tell the jury: "The primary issue for you to decide is whether Mrs. Smith is a liar and a cheat, as the witness hired by the defense is saying. If she is, you should send her out of here with nothing. But if she is honest about her injuries and symptoms, then she is entitled to a fair verdict." The defense now has a choice: embrace its real position that Mrs. Smith is a liar, or disavow it. Watching defense lawyers make this choice on the spur of the moment in front of the jury can be comical.

That is polarizing: **"Are you saying 'X' or aren't you?"** We force the defense to make a choice. And after the defense makes a choice (or after we do it for them), we get to attack their house. The jury then gets to decide not whether our roof leaks, but whether our house is better than the defense house.

One of my favorite authors wrote a whole book describing how to force the defense to take a position, and how to then attack that position.³⁵ There are things we can do in pleadings, discovery, and at trial, and they all involve the same basic concepts. Here

35 Rick Friedman, *Polarizing the Case: Exposing and Defeating the Malingering Myth* (Trial Guides 2007). <http://www.trialguides.com>. The book simplifies and explains these concepts in more detail, giving concrete steps for implementation.

they are in context of a case in which the defense would like the jury to conclude that plaintiff is malingering:

Force the defense witnesses to take a position. Is the plaintiff malingering or not? Make each witness endorse one story or another. Either the plaintiff has been hurt and has legitimate symptoms and injuries, or the plaintiff is faking. Do not let witnesses imply or insinuate. Force them to answer the question: “Is she faking or not?” An “I don’t know” may be acceptable under certain conditions,³⁶ but do your best to make the witness pick a side.

Don’t let the defense or its witnesses retreat from their position. They will try. Before they completely understand where you are going, they will sense they are heading down a perilous road. They will try to backtrack or retreat to murky insinuation. Do not allow this. They can continue to endorse the malingering position or they can renounce it. Do not allow them to stay in the murk.

Destroy that position. You will see that once the choice is between malingering and non-malingering, the medical evidence often becomes clearer. In the absence of clear evidence, most reputable doctors are reluctant to state that someone is malingering. Much of the literature that clouded the picture can be neutralized or even helpful when the choice is malingering or non-malingering. For example, if “85 percent of people with this injury are back at work in six weeks,” is there any literature stating that the other 15 percent are malingering?

Repeatedly draw attention to how the defense is defending the case. As a practical matter, by calling your client a malingerer, the defendant and defense lawyer have put their own characters at issue. What sort of person runs a red light, smashes into someone else, and then calls that person a malingerer? A desperate, immoral person with desperate, immoral lawyers. The “drawing attention” part is done at trial. Before then, we are preparing to draw attention by taking every opportunity to get the defendant to commit to its position that the plaintiff is a malingerer.

When you follow these steps, you force the defense to sponsor a particular story or view of the facts. If the defense says plaintiff is not malingering, that is good for you, right? If the defense says plaintiff is malingering, the jury can examine that claim out in the open and test it against all the evidence. In short, polarizing the case gives the jury two competing versions of the facts to choose from. Either:

The plaintiff was hurt and is still hurt, or

The plaintiff is a liar, a cheat and a fraud.

³⁶ See Chapter 6 in *Polarizing the Case*.

WHICH IS MORE LIKELY?

You have made a fuzzy, murky defense strategy into a clear and open target. Now that you have forced the defense into the open, bring in the witnesses to attack the defense position. The plaintiff loved to bowl with her daughter every Saturday morning. Since the accident she has given this up. Which is more likely, that she gave it up because of her injuries, or because she has been faking for the last two years in hopes of recovering money in a lawsuit? The plaintiff returned to work one week after the accident. Is that what malingerers do? **Note: the defense has put the plaintiff's character in issue. Any evidence of good character is now likely relevant.**

Again, notice how often the defense in your cases fails to openly state the position it wants the jurors to adopt. The more you notice this, the more likely you are to come up with a way to win. Polarizing is just one way.

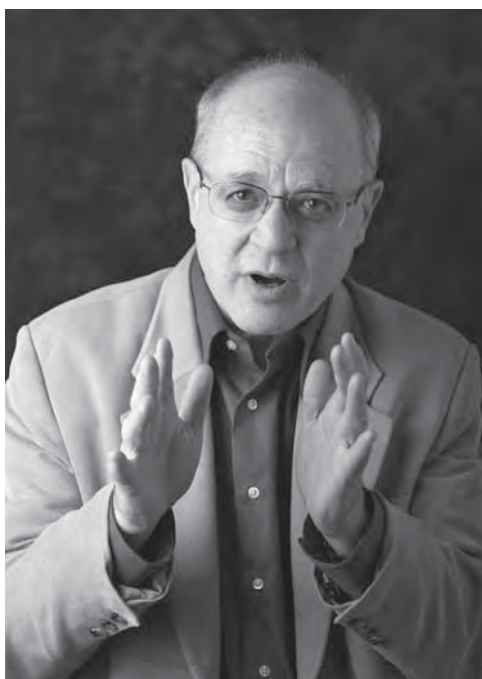
The same concepts apply to many aspects of trial: your client has a burglary conviction which will come into evidence although it has nothing to do with the admitted liability or damages. The defense never made a reasonable settlement offer. Why not? Because it believes a jury will discount the damages on account of the conviction. So why not speak the truth to the jury:

We are here because the defense thinks it got lucky. When Mr. Jones ran the red light, he didn't hit a school teacher, or a housewife driving her kids to school. He hit my client, a man who served time in jail for his mistakes and was trying to build a respectable life. The defense thinks it got lucky—that you will give Mr. Jones a free pass for running the light on account of my client's conviction.

That's the truth, isn't it? Why not say it?

The moral core of many defense positions is rotten. That is why defense lawyers often won't state them aloud in the courtroom. It is up to us to identify the true defense position and have the courage to state it openly.³⁷ Once we have done that, a certain calm and clarity settles over the litigation and trial process. The jurors will have a simple choice between two houses, two stories, and two competing world views. Ours will never be without warts and defects, but compared to the rot of the defense, it looks pretty good.

37 Rick Friedman, *Moral Core Advocacy*, Trial Guides DVD.



DAVID BALL

CHAPTER FOUR

Frack 'em: Loosing the Reptile onto Defense “Experts” (Fracking 101)

Fracking is the use of **Rules + Reptile** to undermine defense “experts.” Fracking shows that the expert is not only unreliable or wrong, but also a pants-afire liar *and public menace*. The principles of Fracking will bulletproof your own treating doctors and experts. This Reptilian attack method is an untapped, weapons-grade method of real impeachment.

And fun. By showing the defense expert to be a liar and public menace, you reinforce juror Reptilian motivation to punish the expert and the defense he rode in on.

FRAMEWORK

Every legitimate investigation must be a neutral search for truth. It cannot be a search for the conclusion the sponsor wants or expects. This means there are several strict, mandatory steps (Rules) the investigator must take. Omitting or violating these steps (Rules) is always a choice, so it is always intentional.

FOUR POINTS BEFORE WE START

FIRST

Never use the term “Independent Medical Examiner.” It contains one lie per word. Move to prevent defense counsel – and the court – from using the term.

SECOND

When you think a defense doctor is honestly mistaken, you’re probably mistaken. Don’t think an IME (or any defense “expert,” for that matter) is honest just because she seems pleasant or authoritative, has good credentials, or works in a respectable hospital, university, or clinic. I have watched respected university department heads lie sufficiently to get themselves booted off the grounds of the Pearly Gates. Believing these damned people is like thinking a prostitute loves you. These “expert” IME creeps routinely lie their peddled asses off.³⁸

³⁸ To learn clues indicative of a possibly untrustworthy witness, car salesman, clergy person, lawyer, date, spouse, offspring, partner, dog, or anyone else, read *Spy the Lie*. It’s quick to read and it’s by CIA interrogators. It works. (Trust me.)

THIRD

What about our own experts and treaters? What makes them different? You. Here's how: The most important factor that determines expert credibility, outweighing all other factors combined, is the quality and clarity of the expert's explanation – in lay-person terms – of the succession of steps she took on the way to her conclusion. We've known this for years. The Reptile makes it work by having our experts go through the steps their profession *requires*. These steps are not optional, nor are the thoroughness and rigor with which each step must be done.

So with your expert, examine:

- what each step is
- why each step is necessary for arriving at a reliable conclusion
- how each step it is properly done
- the harm to accuracy and reliability when any step is violated, omitted, or done incompletely or wrong
- why anyone would violate or omit any of the steps

The expert does not have the freedom to decide which steps to use. They are dictated by the scientific method. They are long-standing. Nothing trumps them. Experts doing any kind of analysis – medical, engineering, economic, whatever – adhere to the required steps. In scientific or science-based (such as engineering) fields, the steps required in moving from facts to conclusion constitute that field's scientific method for analysis and investigation.

When you show that a defense "expert" has chosen to violate the rules of her own profession, the jury sees that her opinion is **intentionally** wrong: that her investigation was never a search for truth, but for a way to give the defense what it's paying for. It's what the cigarette company doctors and researchers did when they spent decades teaching America that cigarettes are healthy. It's what big pharma does daily. These hirelings give a bad name to the whores who work Seventh Avenue.

The required steps for experts provide strong argument for closing: "Don't you think that if the defense could have found a single doctor [or whatever] anywhere, who could follow the rules of her own profession and still come up with the opinion the defense wants, that that's who the defense would have brought in? But the defense could not find anyone like that, *because no one can follow the rules of their profession and come up with the opinion the defense wants.*³⁹

This method shows that the defense expert violated the rules of her own profession for the sake of helping a rules-violating, harm-causing defendant to escape responsibility. This creates a danger for each juror. You needn't make this point overtly; just show the expert's violations, and argue as suggested above. Jurors will figure out the

39 In a very few venues this last point might not be allowed without modification.

rest. They'll want to punish the creep, which they can easily do by rejecting her side of the case.

FOURTH

Your own experts, or non-testifying professionals, or treating doctors can teach you the required rules for analysis and investigation beyond those presented below.

In fact, a good high-school science teacher – chemistry, physics, biology, whatever – can establish the necessary steps, at least the first four below, for any scientific analysis or investigation. In addition, even a fact witness such as your treating doctor can testify about the required steps: it's his description of how he reaches conclusions about his own patients and why he does it that way.

(NB: Your expert gives “conclusions,” not “opinions.” And the defense has only “opinion witnesses” who give opinions, not conclusions. And never say “opine,” dammit! When you say “opine” – or any other high-falutin' word or technical or medical term or legal syntax – you come across as an arrogant jerk. And “opine” sounds like an Irish tree.)

The first few required steps, described below, are the same in every field. They're usually enough to wipe out the defense expert. But when you can show omissions or misuse of steps beyond the first four, which vary according to field, use them too.

As you must do with the rules that frame defendant behavior, with every required step for analysis or investigation you must show:

- What the step is.
- Who says it's required.
- What happens when an investigator ignores or misapplies the step, or when she does it incompletely: i.e., why, how, and how much it renders her opinion unreliable and even dangerous.
- How ignoring or misapplying or doing the step incompletely is not tolerated in actual practice, such as with a doctor's patients, because tolerating it would needlessly and seriously endanger patients because it's unreliable.

In addition, you can ask jury voir dire questions that pave the way for this technique: they spot jurors less likely to demand that experts do their jobs right. “Some folks want doctors to follow the medically required steps when diagnosing them. Other folks think it's up to the doctor whether to follow the medically required steps. Which folks are you closer to?” Then follow up with, “Tell me about that.”

The first required step requires the most explanation. In light of the first, the rest are almost self-evident.

Step 1: IME must begin in an absolutely neutral frame of mind. The IME must harbor *no preference for, nor any advance expectation of*, any particular conclusion. Even the

slightest preference or expectation makes the advance conclusion unreliable no matter how logically the IME can support it. After all, as the Reptile teaches, logic can support anything.

Why is neutral-frame-of-mind mandatory? Can't an IME overcome her expectations and dollar-motivated preferences by simply doing a "strict and fair" investigation? No! She cannot. No one can. It's all but impossible. Even the most honest, rigorous investigator who starts with an expectation or preference will – consciously or not – distort, mis-weigh, ignore, and select among the facts in order to be able to come "logically" to her expected or preferred conclusion. Unconsciously, such an investigator gives extra weight to facts that are consistent with the preconception or preferred outcome, and less weight – or no weight – or distortion – to the facts that are inconsistent. This is how the human brain works. It essentially puts every expert in a potential conflict of interest. Any honest and secure investigator will confirm this. Those with an ax to grind, a funding grant to get, an academic promotion or tenure on the line, a potential check from the insurance company (or you) to help pay junior's tuition, or a "hunch" what the conclusion will be, will almost always arrive at the conclusion they want or expect in advance. When they start with an expectation or preferred outcome, they self-determine the outcome. (See below for how to deal with your own experts on this topic.)

It's easy to show that the defense expert did not start in neutral: How many cases does he turn down? How often does he work for plaintiffs? How often does he follow the other rules for experts (such as gathering all the information, as described below) when doing so would keep him from coming to a defense-favoring conclusion? How do the language and tone of their reports and testimony reveal their bias? As Dorothy Sims and Rick Friedman have pointed out, defense expert bias is often revealed in the written and oral language the defense expert uses: unsupported or gratuitous or subtle implications of malingering or exaggeration, tones of dislike or disapproval of your client, near-nasty comments the defense expert uses in case after case, etc.

Try to get defense counsel's initial correspondence requesting the services of the expert: are there selective details of the case? No one has any business selecting or highlighting anything the investigator should see.

As for your own experts, select carefully. Run the first four steps past them and ask if they know and follow the required steps (and the importance of each) in their particular field. Try to find experts who routinely work for both sides, or routinely say "no" (and can prove it) when their conclusions don't help the plaintiff. Make sure they never resort to unpersuasive nonsense such as, "It's X because experience has taught me that it's X."

Radical suggestion: **Promise to pay 'em no matter what:** Make your expert iron-clad: agree in advance to pay for her full participation (including testimony) no matter what her conclusion turns out to be, and whether you use her or not. This seemingly out-of-line expense will bullet-proof your expert, so make sure the expert talks about

it. It pays for itself even if you need to go through more than one prospective expert. And the defense will never do it. **So you can show that your expert gets paid no matter what his conclusion is, while the IME gets paid only by giving the answer the defense wants.**

Plaintiff's attorneys frequently hear their prospective experts say, "I can't help you with this case." Defense lawyers rarely hear any such thing, because their prospective experts know they get to say "no" only a few times – two or three – before they're permanently dropped from the list. After all, the supply of professionals eager to sell out is endless, and no defense expert wants to lose a job that pays triple her clinical rate. (You can get this ugly dynamic into evidence, but we teach how to do that only in controlled Reptile seminars, not in books. God helps those who don't help the defense.)

This is not about whether an investigator is biased after the investigation ends. It's about how the investigator begins and continues. Investigators doing real science will always start neutrally.

A number of scientific treatises verify all this. See, for example, John J. Lentini's "Toward a More Scientific Determination."⁴⁰ It is for fire investigators, but, as it explains, its principles apply to every kind of investigation. It explains the neutrality principles in ways you can use in trial. Make yourself familiar with this or some equivalent article. It can wipe out the defense expert – and achieve the ultimate goal of making her a Reptilian menace.

The neutrality principle is so important that most doctors and others who do studies on medications and medical devices are now required to reveal whoever is sponsoring the study.

If you have an uncooperative treating doctor⁴¹ and can't afford an expert, some high school science teachers can testify why investigators must start in neutral. They need not get into the specifics of your case; this is about general principles.

Search for anything the IME or other defense expert has written or said anywhere that shows bias against lawsuits, plaintiff's lawyers, or plaintiffs. Look at which seminars they attend and who's there.

Finally, as with all Reptilian methods, this is an innovative approach. Be prepared to support it in case you get objections.

Step 2: Up-to-date: Before starting any investigation, an investigator must verify that he is up-to-date with recent developments in his field that could possibly affect

40 <http://www.firescientist.com/Documents/Minimizing%20Expectation%20Bias%20in%20Fire%20Investigations,%20ISFI%202008.pdf>

41 See Sims in Chapter 14 and Keenan in Chapter 15 about dealing with uncooperative treating doctors.

the investigation. Show that the defense whose is well behind. Make sure your expert is not.

Step 3: Investigator must gather all available information. This apparent no-brainer is also a no-doer. Once the jurors know this is a required step, you can show that the defense expert knows little of what is in the medical record, spent little time examining your client, never talked to the family, and did nothing else in the way of gathering the necessary and available information. (On its own, this is mostly ineffective. But in the context of the required steps, it's dynamite.)

Sometimes a defense expert tries to wriggle out of this by saying, "I didn't need to gather that because it's irrelevant to my conclusion." But he had no way to decide on its irrelevance until *after* he examined it, which means he was required to gather it. The only reason he didn't bother is that he knew in advance what his conclusion was going to be.

Step 4: For reasons obvious by now, the investigator must take *all* the information into account. No cherry picking. "S/he loves me, s/he loves me not" may be useful in ninth grade, but not in science.

Steps 5 and on: From here on, your experts or non-testifying consultants can provide you with the remaining required steps for investigation or analysis within their particular field. The four steps alone are plenty, but the more violated/incomplete steps you show, the more you turn the defense expert into a Reptilian menace.

Beyond the required steps, there's an additional rule: *An investigator must keep her opinions strictly within the scope of her expertise.* For example, even the most extensive medical education, training, and experience do not give doctors the expertise to determine the relationship between impact speed and severity or nature of injury. So their opinion about it carries no more weight than a layperson's. On this basis you should be able to exclude it. If the judge lets it in, use the rule to show the jury that the defense expert is in violation, and that the violation renders her entire opinion unreliable. **Clinical medicine expertise does not extend out beyond the surface of the body.** It does not include biomechanics, statistics, or mind-reading ("malingerin'g.") A physician is not qualified to say, "The car had to be going X mph to do this," or "The car was going only X mph so it could not have hurt as much as the patient says."⁴² Nor does it include, "I think maybe this could be malingerin'g," which requires mind-reading and invades the province of the jury.

42 For additional help, see Dorothy Sims's *Exposing Deceptive Defense Doctors* and Rick Friedman's *Polarizing the Case*, as well as their chapters in this book.

REMEMBER YOUR GOAL

Fracking's goal is to show not merely that the defense "expert" is unreliable or wrong, but also that in order to come to her defense-favoring, defense-motivated opinion, she had to omit or violate the rules of her own profession. That misuse endangers the community by helping a defendant who has needlessly endangered the public. To the Reptile, that makes future harm more likely, so the offending expert becomes the Reptile's target.



DAVID BALL

CHAPTER FIVE

Mechanism of Wreck Mechanism of Harm High-School Teachers as Expert Witnesses Brain Injury in MIST cases

QUICKIE TIPS

Let me start with three major new Reptilian points:

First: “Low-speed impacts are just like bumper cars.” When the defense says no one can get hurt in a six or eight or ten mph wreck, aside from lying they’re also putting onto a permanent public record permission – *encouragement* – for teenagers and others to go on texting (or otherwise paying little attention) while driving in traffic. After all, if it can’t hurt anyone, then why worry about it? But do any jurors really want 18-year-olds (or anyone else) to hear this from a doctor or “expert”? So when the defense whores say it, and when the defense relies on it to protect their money, the defense itself becomes a public Reptilian menace. Your experts can point this out on the stand, as can you in closing. And it suggests a great rule to ask a defense expert – such as the IME or others in that feline house – about: “You agree that people – especially people like doctors – must not encourage anyone to drive dangerously?”

Second: “Thank God! It’s only a soft-tissue injury.” “Soft Tissue” sounds not so bad to injure. Sounds better than injuring “hard tissue.” That’s how the term “soft tissue” minimizes seriousness. But soft tissue is, in fact, more important than bones. Injuring soft tissue is far more serious. Bones feel no pain; it’s always the soft tissue. A failure of soft tissue can be lethal; not so with bones unless the bone injures soft tissue. Bones can almost always be fixed; soft tissue often cannot. Much of the purpose of bones is to protect soft tissue: skull protects head, ribs protect heart and lungs, orbital bones protect the eye, etc. The most important part of us is soft tissue, such as nerves, organs, muscles, brain. And while blood may not quite be tissue, it’s soft – and more important than any bone. So make sure jurors understand that soft tissue cases deal with the most important parts of the body.

Third: Fragile eggshell driving. Jurors’ Reptiles – and the law – require every driver to drive *as if every other vehicle is occupied by fragile people* who are easily injured. Babies.

People with pre-existing conditions. The elderly. The pregnant. People with healing injuries. It's foreseeable so it's the law.

Now on to what this Chapter is supposed to be about.

MECHANISM OF THE WRECK (OR OF ALMOST ANY OTHER "INSULT" TO THE BODY) AND MECHANISM OF HARM

In cases – especially MIST – where jurors can be suspicious of how a seemingly minor event such as a low-speed impact could hurt anyone, you need two Mechanism explanations: Mechanism of the Wreck (or whatever the event was) and Mechanism of Harm.

MECHANISM OF WRECK IS *EXTERNAL*

To your client's body. You need a Mechanism of Wreck explanation when jurors would not automatically know how the event's force (such as hitting the rear bumper) got to the client's body without dissipating. In MIST cases, the Mechanism of Wreck shows how the force of a low-speed rear impact moves mostly intact through the frame and body of the car to get to your client.

MECHANISM OF HARM IS *INTERNAL*

It explains – with simple exhibits – the step-by-step process of what the force does as it goes into and through your client's body. For example, it takes us from the force of the seatback against your client, through the force straightening the spine, snapping your client's head at speeds and forces higher than the initial impact, how the force tears ligaments, how torn ligaments permanently stretch, how permanently stretched ligaments cannot hold the head stable, etc. – all as happens in virtually every rear-end collision case that harms the neck.⁴³ Then the Mechanism explains each step of how stretched ligaments result in pain, lack of mobility, cognitive deficits due to brain damage, etc.

Mechanism explanations must be clear, simple, linear, and expressed in lay-person language and concepts.⁴⁴

When case resources are limited, a high-school physics teacher can do Mechanism of Wreck and the treating physician can do Mechanism of Injury.⁴⁵ There are plenty of materials, including in this book, to get such witnesses up to speed.

Mechanism explanations show that by the time the rear car's impact force and speed get to your client they are magnified multifold. Jurors see in a visceral, logical, and accurate way how a "small" collision is a menace.

Among other things, Mechanism explanations minimize the self-protective feelings jurors cling to about being safe – such as in low-speed collisions. Mechanism explanations

⁴³ See *The Keenan Edge*, Chapter 12.

⁴⁴ See Chapter Nine for Dr. Cohen's example of Mechanism of Harm.

⁴⁵ See Sims in Chapter 13 and Keenan in Chapter 14 about dealing with uncooperative treating doctors.

educate, persuade, deeply personalize, visceralize, and firmly spread the tentacles of danger onto everyone who is ever in a car or light truck on any road or parking lot.

EXHIBITS⁴⁶

You'll want a simple demonstrative exhibit for each significant step in the Mechanisms. These exhibits need not be tailored to your particular case; they can show what generally happens, so long as someone (doctor, high school physics teacher, etc.) testifies that the general explanation applies to this case.

MALINGERING/EXAGGERATION

Mechanisms undermine the distressingly effective and almost always dishonest defense contentions of malingering and exaggeration. Mechanisms make your client's claims believable and real.

OPENING THE DOOR

Malingering and exaggeration claims are attacks on your client's motivation for telling the truth. As such, they open the door to your client testifying about her real motivations. This gives her the opportunity to say something like, "The defendant's rule violation [such as not looking] is the kind of thing that kills ____ people a year, and seriously injures another _____. So I want to discourage people from doing it again. *That's* my motivation." The judge should allow her to say this because witness credibility is the most important thing in trial, and the defense chose to attack it with their malingering and exaggeration implications and accusations. (And compare this to the dangerous crap the defense says: "You can't get hurt in a 9 mph crash.")

This approach is especially useful in stipulated liability cases. It makes liability rules admissible as a response to the defense malingering/exaggeration accusation an attack on your client's honest motivation. And it goes to damages, because since the wreck, your client has been terrified of the maximum harm the rule violation *could* have caused her. (See Keenan's personal example, p. 3)

Warning: *With this, and any, novel approach, go armed with the law to show your right to do this.*

HIGH SCHOOL TEACHERS AS CAUSATION EXPERTS

High-school teachers qualify as expert witnesses. They have the necessary education, training, and experience. High-school teachers of particular use in MIST cases include

⁴⁶ High Impact is the only exhibit company that knows how to do Reptilian exhibits. They have worked closely with Don and David to learn Reptilian exhibit principles, and do excellent illustrations and animations for Mechanism explanations. Also see *Keenan Edge*, Chapter 12.

physics teachers for Mechanism of the Wreck and Driver's Ed teachers for the importance of the rules, injury statistics from low-speed crashes, etc. You might also be able to use certain biology teachers to explain the Mechanism and consequences of some kinds of injuries.

High-school teachers can be more persuasive and credible than the most costly conventional experts. High school teachers know how to teach difficult concepts to people who don't particularly want to learn them. Many high-school teachers are more authoritative and credible than conventional experts. And high-school teachers don't carry the stench of hired guns. In smaller communities, jurors may go home and tell their kids that their teacher was in trial today – so if you select well, the kids will say, "He really knows what he's talking about!"

And high-school teachers will help you for a lot less money than the usual experts.

DRIVER'S ED TEACHERS

It is important to establish yourself in your community and on the Internet as a decent human being who does selfless good acts to help the well-being of other people. Representing clients does not count (except pro bono), since it's not selfless: it pays. Please see this important topic in *Damages 3*, Chapter Nine.⁴⁷ I mention it here because you can do good acts by working with your community's high-school driver's ed teachers. They get very little time and money to develop their courses. You can provide them with authoritative and generally accepted materials – statistics, research studies, demonstrative aids, etc. – to help them teach the consequences of violating the rules of driving. Give them Werner Herzog's devastating video, [From One Second to the Next](#). Keep these teachers informed and up-to-date. And offer to speak to their students about what your own experience has shown you. Do all this for the sake of safer conditions in your community. Your goal is to help the driver's ed teacher be the best possible teacher.

Your help might even attract media attention. (And the life you save could be your own.)

All this is actually against your own self-interest, in that you're helping *reduce* the number of the wrecks – even though you make your living from wrecks. And when you need a driver's ed teacher for a case, she's already fully informed and has the knowledge and materials to support her testimony. You made sure of that when you were helping her be a great teacher. So, for example, she has all she needs to testify on the frequency of low-speed, low-vehicle-damage wrecks causing major injuries.

Among other things, these teachers can testify about the maximum levels of harm and the frequency of harm caused by violations of the rules involved in your case. Jurors are entitled to that information because they are asked to decide if the defendant was negligent – and negligence is gauged by the maximum possible harm (in terms of

47 Also see Don Keenan's 2013-14 monthly series, "Giving Back," in your state trial lawyer association journal. If it's not there, request that they run it. And this book's Afterword.

intensity and likelihood) that could have resulted from insufficient care in that circumstance. Even when negligence is stipulated, this can get in, as you have already read.

PHYSICS TEACHERS + TREATING DOCTOR

With a bit of guidance, a good high-school physics teacher can explain the Mechanism of how the forces of a rear-end impact move through the vehicle to its occupants. It's Physics I. She can explain that none of the impact's energy (the force) can disappear. A tiny fraction turns into sound energy (the sound of the crash). Some is used up by denting the car or bending the frame – so that the less the dent or frame damage, the *more* force goes to your client. Some of the energy is used up in shoving the vehicle forward. The rest of the force – and it's a lot – goes right to your client. A high-school physics teacher can even create a persuasive Mr. Wizard-like demonstration.

The treating doctor should be able to explain what happens once that force gets into your client's body: how the rear-impact force turns your client's spine into a whip, etc. You'll find some necessary information for the treating doctor or the physics teacher in Arthur Croft's book *Whiplash and Mild Traumatic Brain Injuries*, and in Chapter Twenty-One of this book.

BIOLOGY TEACHERS

Some high-school biology teachers can explain what ligaments and nerves are supposed to do and what happens when ligaments are damaged.

BRAIN DAMAGE: ALWAYS CHECK

Any impact to the body great enough to damage ligaments, nerves, bones, or muscles can be enough to cause brain damage – even with no head impact. Yes, a 6-mph rear impact can cause brain damage. The whiplash snap that damages ligaments and nerves is enough. On your own, you cannot tell whether there is brain damage. Nor can the treating doctor or chiropractic physician rule it out. The ER doctor cannot rule it out because brain injury often does not reveal itself during early examinations. And as time goes on, even the client and her family can remain unaware of it. To find out if there is brain damage, start with a neuropsychologist.

Because of the kinds of safety-rule violations that lead to MIST cases, brain injury is as much a problem on American roads as it is in war zones.

Brain damage cases make up a book-length topic in themselves. But shame on you if you shy away due to having to learn new things. To get started – and you must – see nabis.org, the site of the North American Brain Injury Society. It's a portal to some of the world's best brain-damage guidance for plaintiff's attorneys.⁴⁸

48 But be careful: Don't hire their brain experts who lecture plaintiff's attorneys on how to win. It's an easy defense impeachment.

WHY IS SOME BRAIN DAMAGE CALLED “MILD”?

Even “minor” brain injury is catastrophic, because it changes the person’s life. It is called “mild” – as in “mild traumatic brain injury” – only because it’s not life-threatening, and because doctors used to think that it involves metabolic rather than physical damage. But “mild” brain injury affects every hour of the client’s (and her family’s) life. The problems grow worse over time. Mental senility sets in years sooner. And brain damage, mild or otherwise, renders the brain eggshell-vulnerable to future trauma, including low-level impacts that otherwise would have caused no harm.

Brain damage changes the whole nature of MIST injuries. Brain injury results in far larger settlements and verdicts, because it permanently interferes with many of our most important life functions – including protection from future *danger*, to which the Reptile is keenly attuned. And brain injury’s consequences directly involve three of the most Reptilian kinds of harm: isolation, humiliation, and lack of mobility.⁴⁹

Brain injury is detected in various ways. Developing technology makes it easier, clearer, and more readily provable. There is obviously some expense involved, but the expense is essential to help your client – and it multiplies the value of your case many times over.

You must look for brain injury in every MIST (and other) case until it is ruled out by experts. If there is brain damage, your client will eventually need far more help than a non-brain-damage verdict can provide. So it’s your responsibility to check for it. The mere fact that neither you nor the client has noticed brain damage does not rule it out. The mere fact that the head was not impacted does not rule it out. The mere fact that there was no loss of consciousness does not rule it out; the no-loss-of-consciousness argument is a defense myth. Brain-damaged people and their families often miss brain damage, attributing its consequences (if they perceive them) to other causes. And lawyers are no more able to spot it (or rule it out) than are brain doctors able to try a case.

49 See Chapter Seven in Reptile.



ARTEMIS MALEKPOUR

Artemis Malekpour (Chapel Hill, NC), is a partner in the consulting firm Malekpour & Ball, where she specializes in case strategy, focus groups, and jury selection. Artemis came to trial consulting as a lawyer with a background in psychology and psychiatric research. She holds a Bachelor's degree in psychology from the University of North Carolina at Chapel Hill and a Master's in Healthcare Administration with a concentration in mental health issues from UNC's School of Public Health. Before earning her degree at Duke Law School, Artemis worked in the Department of Psychiatry at the University of North Carolina Hospitals with children and adolescents coping with psychiatric disorders and legal issues. Artemis has consulted on a wide variety of high profile cases, and large and small cases of every kind, advising plaintiff's civil and criminal defense attorneys across the country on how to deal with their case weaknesses and maximize their strengths. She was a speaker at the Reptile MIST seminar as well as at many other Reptile seminars.

Reptile Opening Statement: Common Errors

My partner David Ball and I help attorneys with openings. We get calls saying, “I’ve read *Damages* 3. I’m sending you my opening; it just needs a little tweaking.” So they send it. And we read it. My follow-up question is often, “Are you sure you have the book?” Their response: “Of course I have. Yes, really, I’ve read it. I’ve memorized all this stuff.”

We’ve learned is that this stuff can be tough to apply. Reading’s easy; doing it is hard. It can be a long and difficult learning curve. But the opening done properly has so much effect on trial that it’s worth the time and effort to master it. We’ve learned the spots lawyers struggle with, and that’s what this chapter is about.

Start by reading the chapter and the appendices (supplement sections) on Openings in *David Ball on Damages* 3. Make sure it’s the third edition; that’s where the Reptile is. Then come back here to read about the hard parts.

The *Reptile Opening DVD*⁵⁰ is also useful. You get to watch David coach an attorney as she creates her opening. Using the DVD, you can also self-workshop your opening by pausing at the end of each section, writing the corresponding section of your own opening, and then reviewing the DVD to check your work.

Remember, every change you make in the opening template, everything you add to one section that belongs in a different section – or might not belong anywhere – hurts you in ways you’ll never know. As Don Keenan says, “When it comes to the opening template, it’s our way or the highway.”

For a MIST case, you might have a time problem: you’re not always going to have as much time as you need to do a full-fledged opening. I’ll cover that below.

At the beginning of opening: *no advocacy*. This is tough, I know. During discovery, during trial prep, you’ve dealt with a lot of crap. So now you’re angry. You want to *get* the defense, and after all, you are an advocate. You’re fighting for the good guys. But at the start of your opening, you’re the least credible person in the courthouse. Tort-“reform” saw to that. If you advocate right off the bat, you’re asking the jury to gauge your credibility before you’ve earned their trust. So never start by saying, for example,

50 At ReptileKeenanBall.com.

“This trial is about justice because the defendant ran a red light and hurt John.” Early in opening, that will do you more harm – sometimes terminal – than good.

And don’t say anything like, “Good morning, everyone. It’s so good to see you. Thank you so much for being here. This trial process is so important and my client thanks you for being here and I thank you. Everybody thanks you.” Jurors don’t want blather; it makes them stop listening. And they won’t believe your thank you’s. They’ll think you’re trying to ingratiate yourself, and they’ll find it cloying.

So what do you say at the beginning? How about, “Good morning” (or “Good afternoon”) – and then go right into your early rules.

SPEAK PLAIN ENGLISH

No legalese. No medicalese. You’ve taken all this time to learn all this medical jargon, all these legal words, so it’s easy to slip into it, or your secret vain self will want to show off your vast knowledge. Don’t. Not here at the start of opening or anyplace else. Jurors don’t understand it. And when they don’t understand your medicalese, they default to, “I’m not a doctor, I’m not an expert, I didn’t go to medical school, so how am I supposed to decide this case?” And when you confuse jurors with big words, jurors tune you out. They’ll think you’re being arrogant and trying to put one over on them by hiding behind complicated language. So please: no big words. No legal syntax. Always use the simplest, most common words.

And don’t be afraid of normal words. It’s OK to say, for example, “whiplash.” You’re going to teach them what whiplash is. Don’t replace it with something fancy, like “connective tissue injury.” Who knows what that is? And you’ve just paved the way for the defense to come back with, “Hey, you know what this is, that fancy term they just used? It’s just a whiplash case.” So you’ve screwed your credibility and lost a great opportunity to empower a simple term everybody knows. The defense has now turned that word against you and minimized your case to “just a whiplash,” when you could have used “whiplash” to your benefit. So don’t think a big complicated medical term makes jurors think it’s something important. It just makes them think they don’t know what you are talking about, or that you’re trying to trick them by using fancy words to dress up a minimal or fake injury or case.

Use simple sentences. Short sentences. One thought, one single action per sentence. No complex or compound sentences.

No pronouns. We have WorkDays in North Carolina where attorneys come from all over the country (or by video) so we can work through their cases with them. As they tell us what happened, we get a “he did this” or “she did that” or “they did the other.” David or I inevitably interject, “Wait, wait, wait . . . who? Who did what? And to whom?” The attorneys explain, “Oh, well it was the defendant.” Well if the defendant ran the red light, but you’ve used “he,” how do we know it wasn’t the plaintiff running

that light? You might feel awkward saying “Mr. Jones . . .” at the start of every sentence, but regardless, you must banish the use of pronouns. Otherwise you won’t even realize you’re confusing the jury. They can end up blaming your plaintiff for something the defendant did. At best they’ll end up not knowing who did what. That’s no way to talk at any point in trial, but especially not in opening.

So no pronouns.

No contractions. Be careful with contractions. Do not use “can’t,” “didn’t,” “isn’t,” “mustn’t.” Particularly in the poor acoustics of a courtroom and especially to older jurors, those contractions sound too much like “can,” “did,” “is” and “must”. So get into the habit – at all times – of saying “cannot,” “did not,” “is not,” “must not.” Until avoiding those contractions is habitual for you out of trial, you’ll use them in trial, guaranteed. You might feel stuffy avoiding contractions, but it’s better than having some jurors think you said the opposite of what you intended.

Some contractions are OK: “Don’t” is OK because it does not sound like “do.” “Won’t” is OK because it does not sound like “will not.” But “shouldn’t” sounds like “should,” so don’t use it.

And don’t rush. Speak slowly, and use effective – brief – pauses. For example:

Good morning. [*brief pause*]

When we drive [*brief pause*]

we have to look where we’re going. [*brief pause*]

If we do not, [*brief pause*]

and as a result we hurt someone, [*brief pause*]

we’re responsible for the harm. [*brief pause*]

That conveys your ideas in digestible chunks so jurors get and remember them. If you rush, the juror hears:

“Goodmorningwhenwedrivewehavetolookwhereweregoingifwedon’tandasaresult wehurtsomeonewe’re responsiblefortheharm.”

Even when the judge puts time constraints on you, do not rush opening, because that is when jurors start forming in their heads what happened in this case. The first few minutes of your opening – when done correctly – are often the most important words you say in trial.

People who are nervous often rush what they say. Remind yourself to slow down. Practice in advance going slowly; do not try it for the first time in trial. Trial should be your fifth or tenth try.

So now that you know not to use pronouns, or confusing contractions, or fast talk, it’s time to start your opening. So say “good morning,” and then tell us the primary rules the defendant violated.

GIVE THE FIRST RULES

UMBRELLA RULE

The first rule is always the overarching one: “A driver is never allowed to needlessly endanger the public.” Don’t change a word of that rule. Just steal it. Plagiarize it. If you try to put your own flare on this, you will go wrong. I promise. It always happens. So just go with it: “A driver is never allowed to needlessly endanger the public.”

Find one or two (never more) specific “up-front” rules. You may have more, but save them for later, in the reasons-we’re-suing section. And don’t make the “up-front” rules so specific that they can apply only to your case. To use the Reptile, you need jurors to see how this case affects their own lives, their families’ lives – not just someone who was in your client’s position at the time.

So “An ice-cream truck is not allowed to go the wrong way on a two-lane one-way country road” is far too specific. Instead: “Drivers must not drive the wrong way on one-way streets.”

A rule dictates behavior. Your rules must state what one must do or must not do. It is not a description of how things are. “Speeding is dangerous” is not a rule, though it is how things are and it is true. “A driver must look where he’s going” is a rule because it states what one must do or must not do.

Tell the Story. Next, say, “Now let me tell you the story of what the defendant did.” Then tell it – in such a way that the jurors see for themselves (before you say so) the defendant violating the rule(s) you just mentioned. That’s one reason we say no early advocacy. We want jurors *on their own* to figure out that the defendant violated the rule. This is crucial, because jurors are far more committed to their own conclusions than to conclusions you give them. When jurors make up their own minds (“Ah, he broke the rule!”) the rule violation becomes and remains their own conclusion, not something they feel you’re forcing on them.

In the story of what the defendant did, the defendant’s name should be the grammatical subject of every sentence. Don’t say, “Ms. Plaintiff starts to drive south.” That focuses jurors on what the plaintiff did, which you don’t want them to do at this point. When jurors think about your client too early, they will place at least some unwarranted blame on her. Overcoming that can be a Mt. Everest climb.

In every sentence of the story, follow the defendant’s name (never a pronoun) with a present-tense verb that tells us what the defendant did – step by step, one action per sentence. “Mr. Kelly drives south. Mr. Kelly turns left. Mr. Kelly speeds up. . . .” etc.

Think of the story as if you’re telling us what a camera sees and hears as it follows the defendant along. For now, *omit anything a camera cannot see or hear, no matter how important it might be to the case.* So, for example, leave out for now what the defendant

did not do, since the camera cannot see or hear someone not doing something. Don't say, "Mr. Kelly does not look at the road." That's advocacy. All acts of omission are advocacy. And it's way too early for advocacy. You can say, "Mr. Kelly looks off to the side" if you have the evidence for it. But not: "Mr. Kelly does not look at the road." Let the neutral facts that can be heard or seen advocate for you – which they'll automatically do if you tell the story as instructed.

KEEP IT SIMPLE

The story is exclusively about what the defendant affirmatively *does*. Mr. Kelly *drives*. Mr. Kelly *sees*. Mr. Kelly *turns on his wipers*. Mr. Kelly *speeds up*. Mr. Kelly *calls someone*.

Use active verbs, not passive: "Mr. Kelly **hits** the child," not "The child **is hit** by Mr. Kelly."

Omit all of what the defendant *thinks or concludes*, because no video camera picks up thoughts or conclusions. What the defendant "learns" is OK, even though it's in that gray area of what a camera can or cannot see.

During this story, **minimize mention of your client**. Don't even name your client; she's "the pedestrian" or "the Pinto driver," or whatever. Don't mention her at all unless/until you have to. And when you have to mention her, show her as acted upon, not acting herself: Not "Sally goes to her doctor," but "Dr. Williams examines a patient."

Remember, if you talk about the plaintiff too soon, jurors will start blaming her even when they have no facts to do so. When asked to make a decision (such as who was right, who was wrong), people base their decisions on the information you provide. So if you provide early information about your client, the jury will use it to decide your client did something wrong even when she did not. So hold off all information about your client until after the jurors already have good reason to blame the defendant. This may seem like a minor detail. But ignoring or compromising it can cost you the case. This is particularly true in MIST cases.

Tell the story of what the defendant did in chronological order. Chronological order is the only natural way the brain receives information without getting it confused. Breaking chronological order requires the conscious part of the brain to block direct communication to the Reptile. So don't say, "Mr. Kelly arrives at the intersection. Five minutes ago, he had passed a school bus with a load of kids." That sounds clear enough when you sit and think about it, but during the onward flow of a story, it blurs things and cuts out the Reptile. Just start from the beginning and move step-by-step chronologically forward.

In this story of what the defendant did, **avoid saying anything helpful about your client**. Even if it's important, don't include it in this story. You may think, "It's really important that they know that my plaintiff was wearing her seatbelt or his helmet. I want to make sure that they have that piece of information in there, right up front." The

information is important, but not here. It will serve better if you hold it off until later. All it will do in the story of what the defendant did is backfire by raising suspicions. Keep your focus 100% on the defendant and the jury will too.

EXPLAIN WHO WE ARE SUING, AND WHY

Next section of opening is the reasons why we're suing, specifically: "Who we are suing and why." This section deals with:

- A. each safety rule the defendant violated (which can include more than the main rules that start your opening)
- B. why each rule is important (and Reptilian)
- C. how the violation caused harm
- D. what the defendant should have done instead of violating the rule
- E. how following the rule would have helped

Use that five-part paradigm for each rule the defendant violated.

Paradigm Part A. "The first reason we're suing Mr. Kelly is that he violated the safety rule that says a driver has to look where he's going." Then tell us how you know: "Mr. Kelly admits he did not see the car in front until he hit it, so we know he was not looking."⁵¹

Put nothing else into **Paradigm Part A**. You may think, "I need to make sure they know this other thing." Yes, but not now. It comes in later sections where it belongs. Stick tightly to the paradigm: What's the first rule-violating act and how do we know the defendant violated it?

Paradigm Part B (the Reptile's entrance): Tell the jurors what is dangerous about violating this rule *in general*. In this section, do not talk about your case. This is where and how we get the Reptile working, and that requires going beyond the case specifics, as rules are intended to do.

Paradigm Part B is also where you show jurors the maximum harm that violation of the safety rule can cause. You can show this because it's the basis jurors need for deciding whether an act was negligent. The specific harm in the case has nothing to do with the level of care the defendant should have exercised, and it is the latter that defines ordinary care.

So what could the maximum harm have been? Well, there could have been pedestrians in the crosswalk, or a busload of school kids instead of a car stopped at the light.

51 **Ball note:** When a judge won't let you use the word "rule" you can argue, but it's not worth it. Just reword without saying "rule." Instead of saying "The first reason we're suing Mr. Kelly is that he violated the rule that says he had to look where he was going," say something like, "He did not look where he was going, which he admits drivers must do."

By not looking where he was going the defendant driver could have killed people. By showing maximum potential harm, you show that the negligent conduct was major, was a menace, and could hurt me and mine at any time.

Later in trial, try to have an expert explain this. It need not be a high paid expert – the local driver’s education teacher can do it with credibility and in language that jurors understand. In addition, if the client’s awareness of the maximum “could-have-been” harm haunts her, it becomes part of your damages case as emotional harm.

The beauty and the danger of a MIST case – that violating this rule could foreseeably and severely hurt anyone, anytime – helps make the case Reptilian.

In **Paradigm Part B**, you also show how violating the rule poses threats in other kinds of situations, not just the specific one in this case. Use what you learn about your jurors in voir dire to put the rule violation in their world so they can connect to how the rule violation could affect them and theirs. Where else but intersections? How about at school-bus stops, railroad crossings where a violator can shove a car onto the tracks? Etc.

Paradigm Part C. How did the rule violation cause harm in this specific case? “Because Mr. Kelly violated the rule saying he had to look where he was going, he was looking elsewhere, so he drove into the car stopped at the light in front of him . . .”

Paradigm Part D. What should the defendant have done instead? “If Mr. Kelly had watched where he was going . . .”

Paradigm Part E. How would that have helped? “He’d have seen the stopped car in time to stop. He’d have caused no crash.”

UNDERMINING NEGLIGENCE DEFENSES

This is where you deal with anything the defense is likely to say – or that jurors are likely to think even if the defense does not say it – that can hurt your case. This, for example, is where you deal with contrib or comparative negligence, empty chairs, and everything else that can hurt your negligence case. You’ll undermine causation and damages problems later.

Do not say, “Well, the defense will come up and tell you blah, blah, blah.” Don’t give the defense that credit. You own it: “One of the things we had to determine was . . .”, and then undermine. “We had to determine whether there was ice on the road, because if there was ice we would not be here suing because the ice, not Mr. Kelly, would be to blame. So we asked the highway patrolman and we talked with a meteorologist. The patrolman will be here to tell us that the pavement was dry with no ice. And the meteorologist will show us the weather records that say it was three degrees too warm for ice. So in those ways we determined we could go ahead with the lawsuit.”

For one of the strongest things you can do in this undermining section, see Gary Johnson's Judo Law in Chapter Two.

NB: Don't simply say, "We know because the witness [or the doctor or the expert] says so." And don't say, "The meteorologist will explain later in trial how he knows there was no ice." Do it here. Explain here how your expert came to her conclusion, and why the defense's experts are wrong. What rules did they violate to get to their opinions?⁵²

There is a fine line between undermining and improperly arguing in opening. This line varies from judge to judge; make sure you know where the line is and how to adjust your wording to stay within it.

CAUSATION AND DAMAGES

Start with:

Your verdict form will ask how much money to allow in your verdict. To figure that out, you can take into account only the level of harms and losses the defendant caused. Nothing else. Nothing outside that box. Mr. Defense Attorney agrees, harms and losses only. And at the end of trial Judge Solomon will tell you it's the law: base money on harms and losses only. So I need to show you those harms and losses, and how severe they were.⁵³

TO SAY – OR NOT TO SAY – “WHIPLASH”⁵⁴

The word “whiplash” by itself has little power. Many lawyers see it as a joke of an injury. So they run away from the word and use some fancified complicated medical term instead. People do that only when they neither understand nor want to admit how severe an injury whiplash really is, and its mechanism of injury.

But when you use the Mechanism of Crash and Harm techniques, and when you don't shy away from the word “whiplash,” jurors come to understand how the head is whipped with huge force by being powerfully leveraged, concentrating the force of the defendant's impact. This supercharges “whiplash.” And you have a visual and visceral sensation jurors will remember. It becomes credible reason for major injury. After all, the crack of a whip is the sound of the whip *breaking the speed of sound* with no more initial force of impact than the whip-wielder's arm!

HARMS AND LOSSES

What are the *personal consequences* of each injury? Show how each injury (caused by the mechanisms of harm) hurts, impairs movement and other abilities – and how those things in turn impair your client's ability to live a normal life.

52 **Ball note:** See Chapter Four on “Fracking.”

53 See the rest of this wording in *Damages* 3, pps. 149-150.

54 Also see Don Keenan's note in using the word – Chapter One above.

Look for all the ways each injury now puts the plaintiff in danger: Mobility impairment? Can it diminish in any way her ability to protect herself? Or brain damage? That probably means diminished executive function in emergencies: your client could hear someone break in downstairs in the middle of the night, and be unable to figure out what to do: call for help? Run? Grab the baseball bat under the bed? The brain-injured client is more likely to freeze – a real “brain freeze”. The person with this deficit can be normal in every other way but as helpless in an emergency as a five-year old.

This requires time with your client and her family and others close to her. This is because damages are not just about clinical injury; more important is how the injuries have harmed her day-to-day life. Even if you do a hundred whiplash cases a year, don’t assume that every injury is the same for every client. Learn straight from the source – your client and those close to her – how each intrudes.

The goal is to tell the story of what your client’s life is like now (or during the time) that the defendant harmed her.

UNDERMINING CAUSATION AND DAMAGES DEFENSES

Undermine these as you come to them, point by point, in this section. “We had to determine whether the pain in Alice’s neck came not from the wreck but from a fall ten years ago. We asked Dr. Stewart, Alice’s family doctor. Dr. Stewart will tell us. . . .”

Remember, it’s not enough just to say, “Dr. Stewart, as her long-time treating doctor, will tell us that the pain did not come from that fall ten years ago.” You must tell us how he knows it’s not.

OTHER HARMS

Your client’s damages can include how the defense is now minimizing the harm they did to her, such as by calling your plaintiff a malingerer or a liar. That’s where we go to Rick Friedman and Dorothy Sims.⁵⁵

And when the defense says or implies that your client is malingering or greedy, it goes to your client’s motivation for telling the truth – so it opens the wide door to why she’s really suing. “I’m suing because I want to make sure the defendant meets his responsibility because that will help keep more people from violating the rules that says X because those rules are dangerous to violate; they disable thousands of people.” She can say virtually anything that is true that rehabilitates her credibility, because the defense flung open the door and invited it all in.

Of course, make sure it can authentically come from your client. Many things are good ideas or powerful arguments, but not if you or your client cannot pull them off. So talk with your client beforehand and find out how she feels, and why she’s stuck through this lawsuit. Don’t just put words in her mouth and expect her to say them well.

⁵⁵ Friedman’s *Polarizing the Case* and Sims’s *Exposing Deceptive Defense Doctors*.

FIXES, HELPS, AND WHAT CANNOT BE FIXED OR HELPED

What are the costs associated with the harms? What things has your client been doing without which money can fix, help or make up for? Be sure that all these things are connected to the harm the defendant did. Jurors should know that you're not asking the defendant to compensate for any problems your client may have carried with her into the wreck . . . unless, of course, the problems have been made worse as a result.

Explain the differences among "fixing," "helping," and "making up for." A verdict can "fix" lost income. Money for physical therapy can "help" keep the muscles limber, but cannot fix the lost movement function of the muscles. And money can make up for the pain, which can neither be fixed nor helped.

YOUR CLIENT'S LIFE *BEFORE* THE DEFENDANT HARMED HER

So far you have been talking about your client's life after the injuries. Now contrast it with her life before she was injured. This is the only place in trial that it's safe and advantageous to violate chronological order. Do this because the normal life of your client carries no persuasive weight until the jury already knows what the injuries did to her. So at this point in opening, after jurors know the entire "after" story, tell the before story: What was her life like before? What did she do? What was her workday like? What were her activities, what did she love to do, etc. Mention all the things that have changed in Sally's life.

By doing the "before" at this point, seemingly trivial things now loom large: "Every afternoon after school, Sally played basketball with her daughters in the back yard" is trivial before we know all about her injuries. But in light of her injuries, it paints an important and powerful loss. And since jurors now know why she can't play basketball, they connect it to her injuries, making even seemingly "minor" injuries loom large. This won't happen if you talk about her before-life first.

This also helps jurors identify with your client, particularly those jurors with similar interests or similar lives.

You get the information for this from your client, the family, and – most importantly for purposes of testimony – from people with no stake, not even an indirect stake, in the lawsuit's outcome.

TOO LITTLE TIME?

When the judge does not allow you enough time for opening, write out your opening in its entirety as is you had plenty of time. Then trim. And trim some more. And more.

Be concise: Don't use eight words where three will do. Get help with this from someone who's good at it. This can usually get rid of 30 to 40% or even more without omitting a single idea. We lawyers love lots of words. Get rid of the ones you don't need, including some you may love.

This is one reason it's important to write your opening early – as soon as you can put something on paper. That way you see over time, “I don't need this. I can strip that out.”

And when you simply have to omit some important stuff, schedule your witnesses so you can put the important information in – early – through them.

END OF OPENING

Finally, say, “By the end of this case you will see why the evidence makes this the kind of case that will force me to come back at the end and ask for a total verdict that will sound large now, but that by then you will understand is necessary, of \$.”

When you're not allowed to specify a non-economic damages amount, say “. . . that will be larger than you might think right now.”⁵⁶

REMINDERS

Use *David Ball on Damages 3's* chapter and supplements on opening as your detailed guide. Use *the Reptile Opening DVD* for a personal workshop as you learn this system of writing openings. You won't have to do this with every opening you ever do, but this process can shorten your learning curve. And once you learn it, you'll write your openings unbelievably quickly because the template becomes a great accelerator.

Since you will be writing your opening well in advance, you may even want to use it in mediation, where this type of opening has been known to lead to hefty settlements.

⁵⁶ Also See *Keenan Edge*, Chapter Eleven.



ARTEMIS MALEKPOUR

CHAPTER SEVEN

Focus Groups: Multi-Group Deliberation Sessions You Can Afford and Deliberation Excerpts

Before passing this by because you think you can't afford focus groups, read this chapter. When money and hours in a day are scarce, you can do focus groups – including multi-jury deliberating sessions – inexpensively and without eating up too big chunk of your time. So there's no excuse for not doing them. And the return is invaluable.⁵⁷

But don't just improvise and make up your own way to do focus groups. That's a recipe for disaster: you'll unwittingly mislead yourself.

Attorneys who say they don't need focus groups are essentially speeding blind down the highway. When navigating the road or your case, you need to see where you're going. It's the rule for both drivers and trial lawyers: "You have to look where you're going. If you don't and as a result you hurt someone (such as your client), *you're responsible for the harm.*"

The way to look where you're going is focus groups.

No matter how much you know – or think you know – about juries, no matter how many trials you've done, you cannot reliably predict how jurors will respond to any particular case or any particular issues in a case. Focus groups reveal the dangerous unknowns. They tell you how jurors will respond to issues, personalities, exhibits, defense claims, and everything else related to your case.

They also help you maximize case value.

The nature of MIST cases (that they can impact anyone at any time) and crash cases in general make focus groups particularly essential. This is because every juror is an "expert" (or so they all believe). That means their incoming "knowledge" and attitudes carry enormous weight in how they respond to the case. Every juror is a driver, passenger, and pedestrian. They have all hit, or nearly hit, someone or something, have been hit or nearly hit, and have seen others hit, or nearly hit, someone or something.

57 For more on focus groups, see ReptileKeenanBall.com for *How to Do Focus Groups in House* (available webinar), and TrialGuides.com for *Focus Groups: How to do Your Own Jury Research* (DVD and book).

Why is this a problem? Because most of those experiences contradict the major essential points in MIST cases.

For the most obvious example, everyday experience clearly and repeatedly teaches that low impact means little or no injury. So “anyone who claims injury must be faking.” Jurors “know” this as a major “truth.” This gives them an overblown sense of their own authoritativeness. Since people tend to dig in their heels in the face of new and conflicting information, you need to learn how to get past that resistance with your venue’s particular kinds of jurors. You also need to learn which kinds of jurors will be hardest to do that with.

Focus groups do that for you. You’ll find out how jurors in your venue actually think about your case and MIST cases in general, and not merely what you anticipate or predict they might think. What are their experiences with these types of wrecks and injuries? What attitudes and biases will they bring into the courtroom? What worries them? What do they dismiss as unimportant? What weaknesses do they spot in your case, and what strengths? What do they use? What do they think they know – and how suspicious are they – about whiplash “fraud”? And what changes their minds from hostile to friendly?

SMALLER GROUPS

Smaller moderated discussion focus groups can show you what jurors think about specific topics and issues, including those beyond your verdict form. Smaller groups done early on will guide you in discovery and provide insight into a wide range of topics, including how to Reptilianize your case. You can also do smaller sessions to test individual problems and approaches, and to explore juror reactions to specific matters.

MULTI-JURY DELIBERATING SESSIONS

The rest of this chapter is about full, multi-“jury” deliberating sessions. They are the only way to capture raw, unfiltered, free-spoken juror responses. Done properly, these sessions leave you vulnerable to few if any surprises in trial.⁵⁸

Multi-jury deliberating sessions involve two, three, or four juries of six or seven jurors each, with each jury in a separate room. Pay jurors enough to assure getting an assortment that reflects the proportions of your venue’s demographics; you can find those proportions on line. You can spread the cost out over a number of MIST cases, because most of what you learn will apply to every MIST case you do. So you should do one of these larger sessions in every seven or eight cases or so, and smaller ones for every case.

58 **Ball note:** When the situation allows, use a good trial consultant to do your session. You’ll learn a lot doing it yourself, but incomparably more if a good consultant does it for you. But beware: many consultants aren’t much good.

Use six or seven jurors in each deliberating group no matter how many jurors you'll have in trial. This allows you to hear the most from each juror.

Multi-“jury” deliberating sessions will show you how different kinds of jurors will spontaneously (i.e., without prompting) respond to elements of your case. You'll see pivotal thoughts and concerns that arise only when participants are deliberating completely without your involvement.

And with four six-juror deliberating groups, you'll see virtually every topic that jurors in trial will discuss and use – and how to influence that choice and discussion.

You can also fully test your story. Do jurors understand what happened? Where is their focus? How do they apportion blame? What are their assumptions? Where do they create an unexpected empty chair by blaming someone who is not a defendant?

You can test exhibits and day-in-the-life videos – which you must always do before using them in trial or mediation.⁵⁹

You can test arguments, the effectiveness of your mechanism of wreck and harm explanations, and your damages story.

You can test your clients.⁶⁰ You can learn a lot if you bring your client in live to do a direct and cross in front of your focus group jurors. Be sure the cross is strong. And whisk your client off the property as soon as he's given his testimony.

You can also test video deposition clips of your client, the defendant, lay witnesses, or experts. Learn what jurors think of each witness and how each may help or hurt your case.

Test your rules, your analogies, and the language you'll use in trial. Focus groups also help you find and develop rules and analogies, because the focus-jurors will often give them to you.

And you'll see how the Reptile spontaneously drives the words, arguments, examples, analogies, tactics, and the use of facts as jurors' Reptiles deliberate with each other.

The multi-jury deliberating session is the only way you can develop a long-term, gut-level familiarity with how juries actually do their job. It's not only about what jurors think. It's also about the group dynamics of how jurors work *unprompted and unguided* with each other as they struggle step-by-step to a verdict. Juries are the most important single element of your entire professional life. Yet few trial lawyers or consultants

59 **Ball note:** Day-in-the-Life videos can carry a lot of weight – but most of them actually lower the verdict. Always test yours in a focus group. The best of these videos I have seen come from North State Video Productions, in North Carolina.

60 Bringing your client live might raise privilege questions. No case law that we know of has addressed this, nor have we heard of it happening – but it's at least remotely possible that bringing your client live could open the focus group to discovery.

really know much about how a jury functions, so most of their decisions are ultimately guesswork. The more you watch focus jurors deliberating entirely on their own, the less guess-based your strategies and decisions – including spur of the moment strategies and decisions you have to make on your feet in trial – will be. Over the long run, doing multi-jury sessions will make you less of a jury guesser and more of a jury whisperer.

LOGISTICS

Multi-“jury” deliberating sessions need a simple video setup to allow you to watch from a separate room, and for later observation.

For multi-“jury” deliberating sessions you’ll need carefully prepared, well balanced presentations for every side of the case.

Reserve at least two hours after the presentations for deliberations.

Allow deliberations to progress without you or any staff member in the room. Avoid the temptation to go in during deliberations to “explain” anything.

COST

Are you thinking, “Are you kidding me? How do you expect me to pay for a focus group in a MIST case, especially a multi-jury deliberating session?”

First, if you master the Reptile, your MIST verdicts will stop being low-yield. (This is not conjecture; it is track-record.) And again, a deliberating focus group – done right – will show you a lot about multiple cases, so you can spread the costs amongst all of them.

Second, you can share the cost of a multi-“jury” deliberating session with other attorneys who do the same types of cases and can profit by watching (and even helping to prepare) yours. We’ve done these sessions sponsored by as many as ten attorneys. This makes the cost realistic even when we do them for you, much less when you do them on your own.

WHO PRESENTS?

When you do your own, you should have one person – *not you* – present both sides of the case. This must be someone with no stake in the case, so she can present both sides with no bias sneaking through. The presenter can be anyone – a teacher from the local high school, or your neighbor from across the street – any “neutral” person who only has to read the script you’ve written. Too many times we’ve seen biases bleed through no matter how you try to conceal them. This de-neutralizes and taints the information you present, and you don’t even know how or to what extent.

Having a single presenter takes out the personalities, including yours.

Practicing your opening or voir dire in front of a group is great to do, as is finding out how the group evaluates you. But don’t try to double up and learn about your

case at the same time. You cannot learn how jurors will respond to both you and to the case in the same session. So choose the reason you're doing the focus group, and stick to it.

WHO WINS?

My rule of thumb is that I want to go in with the goal of losing my case. If our side wins we don't learn much. And winning usually means you did not present a strong enough defense. When a bunch of jurors say, "Great case for the plaintiff – that's a sure-fire winner," you leave the focus group confident about your case. But how do you know how to arm your good jurors if you don't know what the bad ones are going to say?

Mind you, this does not mean to water down your case. Present as good a case as you've got. But then present a defense better than anything you expect at trial.

RECRUITING PARTICIPANT JURORS

Make sure your sample is representative. Don't get folks off of Craig's List, don't go to the local temp agency or church or senior citizen home, don't advertise in the newspaper, and don't pull staff from within your office or drag in their family members. None of those are representative of the jurors in your venue. See *Focus Groups: How to Do Your Own Jury Research* (DVD and book, Trial Guides) for how to find juror participants. If you do it wrong, you'll never notice how much your focus group has misled you, but it will. Proper recruitment is a sine qua non of a trustworthy, useful focus group.

OTHER AVENUES TO HEAR WHAT JURORS HAVE TO SAY, IF YOU CANNOT DO A FOCUS GROUP

Post-trial interviews: Win or lose, after every case have someone ask the jurors what they thought, if your venue allows. Often they will be eager to talk, once you're able to track them down. Get someone to conduct interviews for you, but without revealing which side is calling until the end of the interview. People speak more neutrally if they don't know which side is asking the questions.

Talk to people in shopping malls. First, it's a good way to practice telling your story succinctly. Also, you'll find out what "regular folks" – like those who will be on your jury – think about your case. Offer to buy them lunch if they'll sit down and talk with you. (Just don't be creepy about it.)

Ask people you know. The cheapest and easiest way I've found to get opinions about a case: I text or email my friends or family (my sister is my best "bad juror") a very brief fact pattern. Sometimes I'll just throw a few facts out there and ask, "What's the first thing that pops in your head?" I don't point them in any direction – I want to know where their minds go with the neutral, limited information I give them. Your friends

and family may not be representative of your venue, but they can be a tough crowd. And – hey – it’s free, so there’s no excuse for not doing this in every case.

SAMPLE DELIBERATIONS FROM FOCUS GROUPS⁶¹

Juror #1: When we came in this room, there was no way I was giving them that much money.

Juror #2: And I was going to give them more.

Juror #1: You should have seen my sheet – I wasn’t giving her a dime, I wasn’t giving . . . you know, no way, we give too much money away. But when you start adding it up, it’s like, wait a minute . . .

Juror #2: It’s not that much.

Juror #1: I know. I mean, it sounds like, right now, it sounds like the jackpot, but . . .

Juror #3: For all that he went through . . .

Juror #2: When I heard all those stories, I said I was going to give them more than they asked for.

Juror #1: Yeah I think this was big neglect on Transportation, um, because CDLs, um, it’s serious. If you get so many tickets, regardless of fault or not, you should be terminated. OK, not to step on your toes. But that’s just bottom line. Um, if they’re, it looks as if they’re more worried about keeping an employee driving than they were worrying about the safety of a person.

Juror #2: My first thought, of course, I want to take into consideration the incident that actually occurred, and I want to put myself in the place of Ms. Morgan and in being a bus driver, and just recognize the care that I do take as just being a regular car driver . . .

Juror #3: Mm hmm.

Juror #2: . . . I don’t see how it’s possible, any shape, form or fashion, even when I come to a crosswalk, the level of caution that you take. . . .

Juror #3: Right.

Juror #2: . . . and considering this is a bus terminal where people come, there’s no way that she should have run this person over. Granted even if he did run back to pick up a piece of paper, that’s just the same as if a child runs out in the street.

Juror #3: Right.

⁶¹ **Ball note:** The most inexplicable thing I see – and I see it too often – is trial attorneys uninterested in watching or reading what focus jurors say in deliberations. This is irresponsible. You should have no greater interest than in devouring every word you can read or watch deliberating jurors say. Even if it’s not your kind of case. Good trial lawyers love seeing how jurors work. Those who don’t love it . . . well, do your clients a favor and retire.

Juror #2: So I took that into consideration. I did think however, when they tried to do sort of contributory negligence, saying that he was actually going after a piece of paper he dropped, I drop things all the time, so if I can imagine myself dropping something, whether it be a piece of paper or a pen in my purse, I'm going to bend over and pick it up whether I'm in the street or not, and even if you see a bus, and if it's 50 feet away, as they say, and she had time to see him, as well as he had time to see the bus, as they say, I would think myself, I can bend over and pick up this whatever it is that's in the street and he should not have been hit by the bus. With that said, I do find as though the driver was negligent. Then moving on to the company. Granted, yes, they had to take on the contract and it's part of the contract and only do a three-year review, but they have the discretion to not only just consider those three years. If it was three years, that's required by law, but they also see their driver's prior history. Not to mention the history that she had while working with them. She had additional accidents. She continued to have accidents and there was no disciplinary action or no revocation taken. She did attend a training but she, in essence, the first one, still passed and they didn't do anything in addition other than send her on another training two days later? Not appropriate as far as my eyes, so therefore I do find the company negligent.

Juror #4: The fact that [the defendant] is even fighting this, they'll easily do it again. Maybe not easily, but I mean just the fact that they are fighting this, they could do it again. Because like I, if you're going by, you know, the letter of the law, yeah, they'll do it again. They didn't do anything wrong. You know, all this money that we're giving now, not necessarily giving, but you know all the money that Mr. Wilson is getting, that's still going away from the letter of the law. You know?

Juror #1: See they have insurance.

Juror #3: Mm hmm.

Juror #1: So what it, I don't know what it is, they'll pay it.

Juror #4: Yeah.

Juror #2: But to discourage them from doing this in the future, what will be a good amount? Do you want to give the one year or less than one year, or more than the one year?

Juror #1: Less.

Juror #4: I say, I mean, I say less . . .

Juror #3: Yeah.

Juror #2: And the amount?

Juror #4: . . . because if they lose, they lose, if they win . . .

Juror #2: About half of that, maybe, well, averaging, \$5 million.

Juror #1: See, see it needs to be legal actions to force them to make a new program. See this is all about the dollar.

Juror #4: Yeah it's all about the dollar.

Juror #2: But we can't do that. We can't take them into consideration.

Juror #1: Yeah I know.

Juror #2: I'm not saying that that's not right . . .

Juror #1: Yeah, I know that's what's bothering me.

Juror #2: But I mean, public policy is totally another issue outside of this case here . . .

Juror #4: Yeah.

Juror #2: . . . but . . .

Juror #4: Yeah that's bothering too, that's getting us, all we can do is a dollar.

Juror #1: Yeah, because we're sitting here going, we just agree and let 'em continue on.

Juror #4: Yeah . . . I tell you what . . .

Juror #1: It happens again, what is our government going to do? They then going to slap 'em on the wrist?

Juror #3: Pay it off again.

Juror #4: If we do . . .

Juror #1: It's ridiculous.

Learn how to empower your jurors.⁶² They believe the company is not going to do anything different, the legislature is not going to do anything about it, how would their verdict? Explain to them and let them see how their verdict will impact what happens, how it will affect the defendant's conduct and protect themselves.

And finally –

Juror #1: I'm with Walter, I suspect . . .

Juror #2: Yeah I suspect too.

Juror #1: I suspect.

Juror #2: We can deal with emotions, but . . .

Juror #1: You know, that they were playing fast and loose with the rules, whatever, but did they know?

Juror #3: But we also know that this company is still open, and if their policies are the same, this could be happening next week. You know what I mean . . .

Juror #2: No, that's not . . . I think they should change . . .

Juror #3: If they don't change their policies and tighten things up.

62 See *Damages* 3, Chapter Eight, 218-221, on empowering jurors.

Juror #4: If, if it's decided that, if they have to pay, pay big money, then they may change their policy. You know, I mean, that's . . .

Juror #3: Yeah, that's what I meant.

Juror #4: . . . that's the point of people being able to bring lawsuits . . .

Juror #3: Yeah true, yeah.

Juror #4: . . . so that, monetarily, companies who don't care enough to make good policies get punished and they change them.

Go out there, find out what people have to say about your case before you take it to trial. Using that information, and using the Reptile, your case is no longer the same old defense-cherished mediocrity. It's on its way to joining the Reptile Revolution.



NATHAN P. CHANEY

Nathan Chaney is a registered patent attorney with extensive intellectual property, bad faith, and tort litigation experience. In 2011, he prevailed over several insurance companies in a pro bono case that cemented the right of Arkansas insureds to independent legal representation. He has written articles for the Arkansas Law Review and other legal publications on insurance, law office technology, and intellectual property. In 2011, Nathan was recognized as the Outstanding Member of the Young Lawyer's Division by the Arkansas Trial Lawyers Association. He has been named a Rising Star by Super Lawyers, and is one of the National Trial Lawyers Top 40 under age 40. He is licensed in Arkansas and Texas.

CHAPTER EIGHT

A Brief but Crucial Point: Undermine the Emergency Doc's Negative X-Rays

The ER doctor's X-ray report is a frequent problem. In nearly every case, the ER X-rays report says, "No fractures – negative X-ray of the cervical spine." If it mentions straightening of the cervical spine, it usually qualifies that finding by saying why the straightening is likely positional.

Defense lawyers love showing these reports to the jury.

The ER doc orders X-rays to look for broken bones. He does not order tests for injured ligaments because (except in rare circumstances) those injuries are for other doctors to test for and treat in non-emergency situations. Also, ligament injuries can be difficult to diagnose in the ER. Tissue swelling restricts the movement necessary to get the proper bending for the X-rays to determine ligament injury. Finally, the patient needs time to heal so that the true, permanent extent of ligament damage shows up.

So it's improper for the defense to use ER X-rays to claim no causation. Plenty of scientific and medical literature shows why, but using too much leaves you wrestling with the pig (both of you get dirty, and he likes it). If you spend too much time on this topic, you create the impression that it's really important. Instead, you should distill down the literature to make the point, and stop.

In the undermining section of opening statement, say something like this:

Before coming to trial, we needed to determine whether the fact that the Emergency Room X-rays showed no ligament problems means there were actually no ligament problems. So we asked Dr. X [give brief credential]. He'll be here to explain to us that the ER doc orders X-rays to look for broken bones, not for injured ligaments. This is because ligament injuries are not emergencies. And ligament injuries are hard to diagnose in the ER, because tissue swelling means the patient can't get into the necessary positions for X-rays to see ligament injury. Dr. X will also explain that the patient needs time to heal so that the full, permanent extent of ligament damage can show up. That's why ER docs tell the patient to follow up with another doctor in a few days, so the doc can move on

to the next patient in the emergency room. So ER X-rays don't show ligament injuries – whiplash injuries – because they can't. It's not what they're intended to do.⁶³

Later, when the treating doctor testifies, have him explain this point and use some of the scientific literature to support it.

63 **Ball note:** This works only when later imaging shows ligament injury. This means you have to ask for the right kind of imaging. See p. 174.



*Dr. Cohen treating L.C. Greenwood, Pittsburgh Steeler six-time Pro Bowl Defensive End
(Photo by Steve Mellon, Pittsburgh Post-Gazette. By permission.)*

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CHAPTER NINE

Trauma to the Nervous System: Mechanism of Harm

Showing Mechanism of Harm to jurors makes the injury real and serious. This chapter will help you understand the mechanism. Your treating doctor⁶⁴ or an expert witness can relay it to the jury.

To show the mechanisms of how external trauma causes permanent or long-term pain, the first step is to explain how the nerves carry messages from one nerve to another. The process is the same regardless of where it is in the body – including in the neck. Jurors will understand most easily if you start with how a fingertip feels something.

Say your finger touches a smooth tabletop. Let's look at how the "smooth surface" message gets to the brain:

STEP ONE

The process starts with the nerve ending in the finger. When it detects "smooth table," it turns the "smooth surface" input into an electro-chemical message. That message travels along the nerve fiber to the far end of the nerve.

STEP TWO

At that nerve's far end, little fibers extend outwards.

When the "smooth surface" message gets to those fibers, they send it across a gap called a "synapse" to receiving fibers on a second nerve.

STEP THREE

The receiving fibers read the message and pass it into the second nerve.

⁶⁴ This book contains several "Mechanism of Harm" explanations of how whiplash causes permanent pain. Chapter Five explains what Mechanism explanations are and why you must use them. This current chapter explains the Mechanism within the nervous system. This Mechanism interlocks with the others in this book. The nexus with the others is the initial stretching of body tissue caused by whiplash or other traumatic force.

The second nerve sends the message on to the little fibers on its far end. The same process continues from nerve to nerve until the “smooth surface” message gets to its ultimate destination, which is usually but not always inside the brain.

This is how our nerves carry messages (such as “hot” or “cold” or “pain” or “itchy” or “gritty”) from one place to another, usually the brain. The whole process takes micro-seconds.

REFLEX

Sometimes micro-seconds are dangerously long. Emergencies must be processed faster than they can be processed if they have to go all the way to the brain. Thus, emergency messages go just to the spinal cord, where they get turned around almost instantly and sent back out as an order for muscles take appropriate action to protect the person. The brain is not involved.

For example, when you put your finger in a flame, the body must direct the muscles to pull your finger out as soon as possible. There’s no time to waste getting the message all the way to the brain. And the brain is not needed because there’s only one thing to do – get your finger out of the flame – and it has to be done instantly. No time for thinking, and no thinking required.

When a message skips the brain we call it a “reflex.” The reflex makes your muscles pull your finger out of the fire. Only after that whole process is over does the brain become aware of what happened. This is how you get your finger away in time to minimize the burn – even before your brain knows about the flame.

HERE’S HOW REFLEX WORKS

STEP ONE

Nerve ending in the flame sends “**TOO HOT**” message along one or more nerves to the spinal cord.

STEP TWO

Because “**TOO HOT**” is an emergency message, it bypasses the brain and, instead, sends a “**YANK IT AWAY!**” message directly to muscles to yank the finger out of the flame. The microseconds this saves by not wasting time going to the brain for instructions can make the difference between a minor burn and a major burn.

STEP THREE

When the muscles get the “**YANK IT AWAY**” message, they tighten. The tightening pulls the finger out of the flame.

(Then, in less of a hurry, the “**TOO HOT**” message goes up a tract to the brain, so now the brain knows the flame is hot. I’ll cover this later.)

LONG-TERM PAIN

When the trauma is much more complicated and powerful than just a finger in a flame, the message through the incoming nerve can be so strong that it overloads the system. The overload can cause long-term pain.

Whiplash is a nerve-overloading trauma. The head is whipped too far forward, and then too far backward, stretching neck muscles beyond their normal limits.

When a muscle is stretched beyond its normal limits, the extreme and sudden forces create an abnormally strong message – so strong that it overloads the nerves. Here's how it works:

STEP ONE

Whiplash stretches neck muscles too far.

STEP TWO

The muscle end of the nerve sends an “**OVERSTRETCHED!**” message to its little fibers at its far end, in the spine.

But this time those fibers don't relay the message to a nerve that goes to the brain. No time for that. This is a job for a reflex. So:

STEP THREE

The little fibers send a response message – “**TIGHTEN UP RIGHT NOW!**” – to a nerve that goes directly back to the muscle. Since it skips the brain, this is a reflex.

STEP FOUR

Responding to the “**TIGHTEN UP RIGHT NOW!**” message, the muscles tighten. If a muscle being traumatically stretched does not quickly tighten, the stretching trauma could rip it apart.

STEP FIVE

When the whiplash force is too strong, the system overloads. This happens in a place between the messaging nerves called the “Intern uncinal pool” – IP for short. The IP regulates the strength of the “**TIGHTEN UP NOW!**” message that goes back to the muscles.

STEP SIX

The IP overload keeps sending “**TIGHTEN UP RIGHT NOW!**” messages over and over to the same muscles – even after tightening is no longer needed. And each time the message is sent, the IP opens for a longer time – like keeping a water faucet open longer. When this cycle keeps the muscles continually tightening, it is called “muscle spasm.”

STEP SEVEN

Muscle spasms send “DISTRESS” messages back to the IP.

STEP EIGHT

When the IP gets those distress messages, it sends still more “**TIGHTEN UP RIGHT NOW!**” messages back to the muscles, which then tighten even more, and send even more stress signals to the IP, and. . . well, the vicious cycle goes on and on.

And as all those “**TIGHTEN UP RIGHT NOW!**” repetitions continue, the nervous system “learns” to stay in this abnormal state – permanently. The water faucet can no longer close, and it takes less and less of a message to make the muscle tighten.

STEP NINE

Finally, the message to the muscles says, “**TIGHTEN PERMANENTLY.**”

STEP TEN

When a muscle is permanently tightened, several things happen. First, the muscle swells and presses on nerves, so the nerves send “**PAIN**” messages to the spinal cord and brain.

And we hurt!

STEP ELEVEN

At the same time, the nerve impulses that tell the muscle to tighten also tell the blood vessels to constrict.

STEP TWELVE

Constricted blood vessels have trouble carrying away metabolic waste products from the tight muscle. So the waste accumulates at the muscle. This causes swelling.

STEP THIRTEEN

The accumulated waste chemically irritates nerve endings.

STEP FOURTEEN

The irritated nerve endings send more “**PAIN**” messages to the spinal cord and brain. Now we hurt more.

STEP FIFTEEN

Because all this is going on, the body rushes chemicals through the blood stream to the muscle to fight the swelling and inflammation.

But the blood vessels are constricted, so these chemicals stay there too long. Like other waste, they irritate the nerve endings, sending even more “**PAIN**” messages. So the nerves go on sending more and more pain messages. In response, the outgoing

nerve keeps sending more and more **“TIGHTEN MUSCLE MORE”** messages. The more the muscle tightens, the more it hurts. More pain → more “tighten” messages → more pain → more “tighten” messages. This feedback cycle goes on and on.

So now, even with the whiplash forces gone, the cycle makes pain go on and on. And all that’s just part of the story.

THE BRAIN

The rest of the story involves the brain. To see how this works, let’s go back to the whiplash: the neck is whipped back and forth, stretching muscles – so the reflex takes over: **“TIGHTEN MUSCLE RIGHT NOW!”**

BRAIN STEP ONE

At the same time, other nerves carry the **“STRETCHED MUSCLE”** message to the brain. By the time the brain can process that message, the muscles have already tightened. But the brain doesn’t know that, so:

BRAIN STEP TWO

Although the muscles have already tightened, the brain sends yet another message to the muscles to tighten up. And the cycle goes on and on.

BRAIN STEP THREE

Now the brain expects yet more traumas coming up. So it sends out more and more **“TIGHTEN MUSCLE!”** messages. That creates still more pain. And at a certain point the brain overloads just the way the IP center did. So the pain becomes permanent.

BRAIN STEP FOUR

As all this pain/response activity continues, the brain learns to expect even more trauma. To prepare for it, the stressed brain begins to order *other* muscles, nowhere near the trauma site, to tighten as well. This is to keep them constantly ready for “fight or flight.” Since the “Tighten” messages keep coming, the usual cycle takes over, so the spreading pain is now permanent.

This process occurs independently from, and outside of, the brain; it’s in the IP (intern uncinal pool). Impulses just “spill over” to other levels of the cord and even to the other side of the cord. This can affect muscles far from the site of the original injury.

DELAY

It can take days or even weeks after the whiplash trauma for the brain to start sending these messages. This is why a person sometimes has no pain from a crash until six weeks later. And it’s why pain that originated from trauma to the right side of the neck can cause pain in, say, the left side of the lower back.

This can get so bad that it physically changes the brain. (The technical word for this is “neuroplasticity,” which means “remodeling.”) From then on, the pain continues on its own – even after everything else completely heals. Maybe someday we’ll find a way to cure that, but not so far.

DEFENSE “EXPERTS”

Doctors who are untrained in pain management may see nothing wrong with the patient, because the nerve-message cycle does not show on imaging studies such as X-rays or MRIs. So the only way the untrained doctor has of explaining the patient’s pain complaints is to call the patient either neurotic or dishonest. This becomes a horrible situation for the poor patient who knows he hurts. And when that untrained doctor is a defense witness, the result can be a true miscarriage of justice. This is why you must educate the jury on what is really going on in the nervous system.



DON CHANEY

*Don P. Chaney is an AV-rated trial lawyer from Arkadelphia, Arkansas, where he practices injury law and insurance bad faith law with his two sons and daughter-in-law. In fighting insurance abuse for clients with permanent torn spinal ligament injuries caused by collision trauma, the firm uses medical technology tools to provide objective medical evidence in court. This includes proton density MRI and computer measured X-ray reports (CRMA) correlated to the AMA Guides. In 2007 he won the first appeals court decision in the United States to approve the use of digital video fluoroscopy (DMX) as trial evidence over a defense Daubert challenge. Using these medical technology tools, Don won a \$1,500,000 jury verdict in 2007, and with the help of his sons in 2011 and 2012, remarkably won a \$1,000,000 verdict twice in the same case that was affirmed on appeal in 2013, which involved chiropractic testimony and a little over \$18,000 in medical bills. Don is active in community and professional leadership roles. **Speaker at the Reptile in MIST seminar.***

CHAPTER TEN

Diagnostic Tools for MIST Cases

This section is about medical technology tools that diagnose torn spinal ligament injuries, and how those tools help overcome the hardball methods the insurance companies use against our clients.

These hardball tactics began in the mid-1990s, when Allstate had an initial public stock offering. They paid \$250 million to McKinsey and Company to learn how to increase their profits. They did that by turning their claims department into a profit center, by putting boxing gloves on the “good hands.”⁶⁵ Result? The Colossus computer program’s garbage in, garbage out.

On February 9, 2007, the CNN Anderson Cooper 360 television program exposed the insurance industry’s hardball campaign to “Delay-Deny-Defend” all motor vehicle collision claims involving connective tissue injuries of the neck and back. Fortunately, we now have scientific medical tools to overcome such abusive insurance defense tactics by providing convincing evidence to support fair jury verdicts for injury victims. Digital video fluoroscopy, also known as Digital Motion X-ray (DMX), and Computer-Aided Radiographic Mensuration Analysis (CRMA) are scientific tools developed to aid in the diagnosis and treatment of permanent torn spinal ligament injuries. If these tests are positive, then there is clinical justification to order proton density MRI imaging, preferably from an upright MRI center, which has two millimeter thin-slice resolution for a radiologist to analyze the depth of the scar tissue resulting from torn spinal ligaments.

These medical technology tools are especially valuable as diagnostic tools for Cervical Acceleration/Deceleration (CAD) injuries caused by the whiplash injury mechanism due to motor vehicle collision trauma. Such trauma causes 3,000,000 whiplash injuries per year in the United States, where 50% of these injury victims will fully recover, 40% will suffer some degree of permanent injury with chronic pain, and 10% will become permanently disabled. This whiplash epidemic is caused in part by the stiffening of vehicle bumper systems to avoid or minimize property damage to vehicles, which

65 **Ball note:** I call it “brass” knuckles on the good hands.

causes the instant transfer of crash energy trauma to vehicle occupants, and which provides the mechanism of injury in low speed and higher speed collisions.

We like working with chiropractic physicians. Many people consider chiropractors to be the true musculoskeletal injury specialists.⁶⁶ They are trained to work on torn spinal ligament and disc injuries. The medical community's pain pills, muscle relaxers, anti-inflammatories, and anti-depressants don't help much with the torn spinal ligament injuries. Chiropractors are also trained to be X-ray specialists. X-rays of their patients are taken standing up (in the emergency room they lay down). X-rays and MRIs taken lying down often don't show the damage.

Chiropractors have also been leaders in using digital video fluoroscopy that creates a movie showing X-rays in motion. It shows more of the spinal ligament damage. My firm was, I believe, the first to win an appellate decision approving its use.⁶⁷ That case also serves as a good primer for how to lay a foundation for your treating chiropractic physician to testify about diagnosis, permanent impairment rating, and need for future treatment.

Static or motion X-rays can be saved in a computer file. You can freeze frame, slow motion, and capture specific motion X-ray images. The analysis is specified in the *American Medical Association's Guidelines to the Evaluation of Permanent Impairment*. Basically, if neck bones in the spine shift 3.5 or more millimeters between the flexion and extension views, the *AMA Guides* assign a 25 percent whole person impairment rating. If a vertebra is rotated (angular instability) by a difference of 11 degrees compared to an adjoining vertebra, that is also designated a 25 percent whole person impairment rating.

These tools pinpoint the damage, provide a more accurate diagnosis so the best treatment plan can be developed, and give us objective medical evidence to quantify the extent of permanent injuries.

The physician should also order an MRI if the X-ray tests are positive. Regular MRI sequences take a 4 to 7 millimeter slice, which can find a herniated disc, but often won't find what's wrong with your injured client. How many of us have seen MRIs come in on our clients that read normal, but we know there's something wrong that the MRI didn't show? While all MRI machines can run a special proton density sequence to take a 2 millimeter slice, many radiologists are not trained to read these images, and have no ability to train the technicians to acquire these images. This is relatively new, so suggest it to your MRI radiologist. It can show permanent injuries in the structures that hold the spine together, and that hold the skull to the upper spine. Remember, to find specific damage, you must run the specific test designed to look for that damage.

66 **Ball note:** Many other people still consider chiropractors to be quacks, and this can vary widely by region. Ask about it in voir dire: "Some people/other people" etc.

67 *Graftenreed v. Seabaugh*, 100 Ark. App. 364, 369; 268 S. W. 3d 905, 912 (2007).

A major development in the chiropractic profession was for the National Guidelines Clearinghouse to incorporate Dr. Arthur Croft's grading scale and treatment guidelines for whiplash injuries.

Dr. Croft published this in the second edition of his textbook in 1993, and over many years it gained acceptance. The National Guidelines Clearinghouse is a coalition of the U.S. Department of Health that administers Medicare, the Alliance of American Insurance Plans that represents 1,300 insurance companies and self-insured plans, and the American Medical Association. This coalition wants to pay only for treatment methods that work. Their evidence-based treatment guidelines include Dr. Croft's cervical treatment guidelines for whiplash injuries.

You must first grade the injury Grade 1 through 5. Grade 1 is a simple strain/sprain. Grade 5 is the other extreme, a fusion surgery. Grade 4 is spinal instability that can include the 3.5 millimeter translation, which the AMA classifies as a 25 percent whole-person impairment. Qualifying for Grade 4 provides for 76 treatments within the first 56 weeks after the injury, and then at least one a month for the rest of the patient's life. That goes into the life care plan, and the chiropractic physician is qualified to testify about it.

So when the adjuster calls to imply my client's a "liar, cheat, and faker," because she should have fully recovered within six to eight weeks, I say that's true for the majority (who have Grade 1 injuries), but not the minority with the worst whiplash injuries.

We tried a case in 2011 in which our client had \$18,100 in medical bills. He got the initial chiropractic treatment that he needed, but still had problems. He went to his family doctor, who referred him to an orthopedist and a neurosurgeon. He was a truck driver who got hit by another truck driver. The federal jury decided on a \$1 million verdict. The federal judge granted a new trial, and we retried the case early in 2012. The judge was meticulous in not letting the jury know anything about the first trial. By now the medical costs were up to \$18,458. We used a chiropractor to explain medical illustrations of the torn connective tissues of the head and neck as shown by the X-rays, DMX, CRMA, and MRI. Remarkably, the second jury decided on the same amount of \$1 million for damages.

We showed an illustration of the torn ligament tissues connecting the skull base to C1. C1 rotates around a knob on C2. When they executed people by hanging, the rope would break off the knob on C2 and sever the spinal cord. We also showed illustrations of the two stabilizing ligaments that run the full length on each side of the spinal column, including a close up view of the torn ligaments causing spinal instability due to excessive rotation of the C4 vertebra.

Pain comes both from the torn ligament tissue itself, which has its own pain receptors, and from nerves entrapped in scar tissue. The vertebra's instability causes a host of other problems as well.

Our client had a pre-existing degenerative disc with a bone spur. The insurance industry's position, as you know, is that with a pre-existing condition, you lose. Our

position is that a pre-existing condition means you win bigger because it was why the injury was more serious: the client had a vulnerability that made him more susceptible to traumatic injury.

The thin-slice proton density MRI showed the scar tissue resulting from the torn spinal ligaments that correlated precisely with the X-ray measurements of instability. The treating physician explained what the injuries meant as they related to the other structures. It's a simple explanation, which is important.

In late 2011 we had a trial in which a jury in a conservative venue decided on a \$540,000 verdict in a case with \$21,638 in mostly chiropractic bills. The client was 45, deathly afraid of any kind of surgery, and wanted nothing to do with any medical doctor. A straight chiropractic case. The chiropractor had the flexion and extension X-rays measured and correlated with the *AMA Guides*, and the damage shown by the MRI was perfectly correlated with the X-ray findings. Good result.

SUMMARY OF AMA GUIDES IMPAIRMENT RATING METHODOLOGY

The American Medical Association (AMA) is the largest national association for medical doctors. The AMA publishes the *Guidelines for the Evaluation of Permanent Impairment*, widely accepted as the number one impairment rating guideline in the United States. This medical book recognizes abnormal spinal movement (instability) as permanent impairment based upon objective measurements of the patient's X-rays. Many states require that this book be used when permanent impairment ratings are assigned to worker's compensation claimants.

According to the *AMA Guides, 5th Edition* at page 379: "... loss of motion segment integrity is rare, unless accompanied by trauma. . . . Motion of the individual spine segments cannot be determined by a physical examination but is evaluated with flexion and extension roentgenograms (X-rays)."

The specific measurements correlating to impairment ratings for the cervical spine are in the *AMA Guides, 5th Edition*, Table 15-5 at page 392, as follows:

DRE Cervical Category IV - 25% - 28% Impairment of the Whole Person

Alteration of motion segment integrity . . . at least 3.5 mm of translation of one vertebra on another, or angular motion of more than 11 degrees greater than at each adjacent level.

An explanation and diagram showing how to measure loss-of-motion segment integrity translation, or slippage, between vertebral bodies is shown in Figure 15-3(a) appearing in the March 2002 *Errata Supplement* to the *AMA Guides, 5th Edition*. An explanation and diagram showing how to measure loss of motion segment integrity angular abnormalities is shown in Figure 15-3(b) appearing in the March 2002 *Errata Supplement* to the *AMA Guides, 5th Edition*.

The specific measurements correlating to impairment ratings for the lumbar spine are found in the *AMA Guides, 5th Edition* within Table 15-3 at page 384, as follows:

DRE Lumbar Category IV 20% - 23% Impairment of the Whole Person

Alteration of motion segment integrity. . . at least 4.5 mm of translation of one vertebra on another, or angular motion of more than 15 degrees greater than at each adjacent level of L1-2, L2-3, and L3-4; 20 degrees at L4-5; and 25 degrees at L5-S1.

The *AMA Guides, Fifth Edition*, states on page 18 that “an impairment evaluation is a medical evaluation performed by a physician, using a standard method as outlined in the Guides to determine permanent impairment associated with a medical condition” and states that “impairment evaluations are performed by a licensed physician.” In addition, according to page 33 of *Master the AMA Guides, Fifth Edition*, “Nearly all states and the District of Columbia allow medical impairment ratings to be performed by medical doctors, osteopathic physicians, chiropractic physicians, dentists, psychologists and podiatrists.”

There is no requirement by this publication for an impairment rating to be performed only by a medical doctor. To the contrary, any qualified physician, including chiropractic physicians, may assign a permanent impairment rating. Page 17 of the *AMA Guides, Fifth Edition*, states:

. . . if the clinical findings are fully described, any knowledgeable observer may check the findings with the Guides criteria. . . any other observer or physician following the methods in the Guides to evaluate the same patient, should report similar findings.

The *AMA Guides* are clear on the rating methodologies and qualifications. The *AMA Guides* are basically a set of standards, similar to a cookbook, for any physician or other “knowledgeable observer” to give an impairment rating based upon “objective and measurable physical findings.” Either the patient qualifies for the rating or does not, based upon objectively measured test results.



DON CHANEY

CHAPTER ELEVEN

Common MIST Defenses

Be prepared to address the following defenses, depending on the facts of your case:

- No report of injury by plaintiff to the investigating police officer
- The plaintiff did not leave the collision scene by ambulance
- The plaintiff did not receive treatment at a hospital emergency room
- Delay in onset of plaintiff's symptoms
- Delay in treatment of plaintiff
- Plaintiff's employment of lawyer within a short time following injury
- Referral of plaintiff to a treating physician by plaintiff's lawyer
- Referral of plaintiff to plaintiff's lawyer by a treating physician
- Low speed collision with no or minor property damage to plaintiff's vehicle (any "common sense" or "no crash – no cash" defense arguments correlating property damage and injury have been refuted by the credible scientific literature. See Arthur C. Croft and Steven M. Foreman, *Correlating crash severity with injury risk, injury severity and long-term symptoms in low velocity motor vehicle collisions*, Med. Sci. Monit. 316-321 [2005]; Davis v. Maute, 770 A. 2d 36 [Del. 2001]; and many other publications)
- Absence of injuries to other occupants of vehicles in the same collision
- Previous injuries to the same body part
- Subsequent injuries to the same body part
- Lack of complaints about collision injury symptoms within physician treatment records for unrelated medical problems
- Plaintiff not following treatment recommendations by physician
- Plaintiff continuing to treat with physician after becoming pain free (which is important for torn ligament scar tissue remodeling that can take a year or more)

- Plaintiff continuing with activities of daily living, employment and recreation (albeit with pain and less vigor; see *Graftenreed v. Seabaugh*, 100 Ark. App. 364, 369; 268 S.W. 3d 905, 912 [2007] stating that “a permanent injury is one that deprives the plaintiff of her right to live her life in comfort and ease without added inconvenience or diminution of physical vigor”)
- Implying that the defendant cannot afford to pay any judgment to be awarded by the jury, and other efforts to improperly invoke the jury’s sympathy for the individual defendant (whose insurance carrier is using as a pawn to hide behind because the insurance carrier cannot be sued directly in most states)
- Telling the jury to “let’s hurry up and get this little frivolous soft tissue case over with, and stop wasting everyone’s time so we can all go home to our families as soon as possible”; and
- The defense lawyer personally attacking the plaintiff’s lawyer by vilifying, questioning his motives, and playing to disdainful stereotypes of plaintiff lawyers and plaintiffs. Study *Lioce v. Cohen*, 174 P. 3d 970 (2008), to protect your injury clients from the defense using unethical character assassination tactics.

STAY FOCUSED ON THE SIMPLE TRUTH

None of these so-called “defenses” are relevant as to whether your injury client was truly injured by the collision. There may be gaps in treatment by physicians, but there are no gaps in the permanency of injuries causing chronic pain, which are actively treated by numerous home therapy modalities.

A key to success is polarizing the case using numerous “before and after” lay witnesses to describe the change in the client’s lifestyle and activities. A jury is more likely to find for our injured clients when supported by witnesses who have collectively known our client for over 100 years, and reject the standard defense that our client is a “liar, cheat, and faker.”



MICHAEL FREEMAN

Dr. Michael Freeman is a forensic epidemiologist and a (full) affiliate/adjunct professor of forensic medicine, epidemiology, and psychiatry. He has a doctor of medicine degree and a Ph.D. in epidemiology, as well as an MPH degree in epidemiology and biostatistics. Known in the legal field for his criminal and civil forensic consultations, Dr. Freeman has more than 140 published scientific papers, books, and book chapters on applications of epidemiology in forensic medicine, crash-related injuries and death, injury biomechanics, and a variety of other areas. Additionally, he has a number of publications on the identification of logical fallacy and junk science in expert testimony for the legal profession. Dr. Freeman has provided expert testimony at deposition and trial nearly 1,000 times in state and Federal courts throughout the U.S., as well as courts in Canada, Australia, and Europe.

CHAPTER TWELVE

Epidemiology and the MIST Case

***Background:** I'm a full Affiliate Professor of Epidemiology and Psychiatry at Oregon Health and Science University School of Medicine. I have a medical doctorate, a Ph.D. in epidemiology, and an MPH in biostatistics and epidemiology. Before I ever started down the road of becoming a scientist I was first trained as a chiropractor (my Dad's a chiropractor, and I grew up around it), and practiced for a number of years while I was working on my additional education. In addition to my academic degrees I have an extensive background in biomechanics and crash reconstruction. My full-time work, both in the academic and consulting arena, is concerned with forensic applications of epidemiology. The kinds of civil cases that I deal with range widely, but they are primarily injury litigation (mostly crashes), medical negligence, toxic tort, and product liability.*

WHAT IS EPIDEMIOLOGY?

Epidemiology is the scientific study of the three “D’s” of disease and injuries in populations: Distribution, determinants (risk factors) and deterrents. It is the field of science that allows us to find out what causes injuries and disease. Although most people think about epidemiology in terms of the word “epidemic” (and thus diseases), epidemiology of injuries – including car crashes, one of the most common causes of injuries – is an important field of study. The Centers for Disease Control and Prevention has an entire division that looks at crash-related injuries and deaths and other kinds of related traumas.

EPIDEMIOLOGY IN THE LEGAL SETTING

In the legal setting, epidemiology answers questions of cause and effect in which competing risks can be weighed and compared. There are some types of injuries or diseases where the cause is never in question; for example, mesothelioma is always caused by

asbestos exposure. The causation is purely medical, because it is the diagnosis that dictates the cause.

In other cases, causation is more difficult to pinpoint. Even lung cancer in a lifetime smoker isn't caused by the smoking *as a certainty*, because not everyone who smokes gets lung cancer, and people who don't smoke get lung cancer, too. In order to evaluate such questions one needs to compare the risk of lung cancer among smokers (around 20 percent) to the risk among non-smokers (around 1 percent). Thus, the *relative risk* of cause of the lung cancer in the smoker is the smoking by 20 to 1. Because nothing medically about the cancer answers the causation question, the relative risk from epidemiologic study allows for a determination of the *most probable* cause of the cancer.

Relative risk is an extremely important concept for MIST cases. To understand this, you have to understand how risk is systematically misused in these cases by the defense, based on the reliance on two logical fallacies that sound very reasonable to most people, which is why these fallacies work so often. The first of these fallacies is the *middle ground fallacy*.

Here is a silly example, which is a good illustration: Let's say that someone we trust, like a doctor, says that yesterday he saw a teacup on a table in the dining room. Let's also say that we know from prior observation that there is a teacup on that table on one of every 100 days. So for any given day – such as yesterday – there is a one in a 100 chance there would be teacup in the dining room. This is the plaintiff's case – the teacup was on the table because the doctor says so, and we know that it is possible that the teacup was there yesterday.

The defense counters this with a statement that not only is it not *certain* that the teacup was on the table – because it can't be said that it is there more often than not – but that yesterday the teacup was really in orbit around Jupiter (see why I said it was silly?), and further, that the plaintiff cannot disprove this alternative (Jupiter) theory because no telescope is strong enough to see the teacup from Earth. The defense can then take what sounds like a reasonable position, which is that they will admit that the plaintiff's position is *possible* – but that so is their Jupiter position. The result is a *middle ground* compromise.

In this case, this means the teacup is most probably on Mars.

It is a fallacy because the probability that the teacup is in the next room – 1 in 100 – is more than a trillion times more likely than the chance it's on either Mars or Jupiter. **The “anything's possible” defense makes all probabilities of cause equal, even when they are not.**

The exact same technique is used successfully by the defense in many different types of cases, but none more effectively than the minimal property-damage crash case. Someone gets in a car crash with minimal property damage. The next day they tell their doctor, “I have neck pain” and two months later they have neck surgery. So the defense says, 1) minimal property damage means injury is unlikely, 2) you can get a disk injury

in your neck just rolling over in bed, and 3) the pre-existing degenerative changes mean the problems were all there before the crash. All of the explanations sound reasonable.

So the jury says, “Well, if an injury isn’t certain from a crash with minimal damage, and all the experts admit you can get a disk injury rolling over in bed, and if the problem was there before the crash, it sounds like it’s only *possible* that the crash was the cause of the injuries.” The plaintiff cannot demonstrate that the crash is a more than 50 percent probable cause of the need for the surgery, because the jury has been misled into believing that all explanations are equally likely.

But the three explanations for why the plaintiff started having neck pain on the day of the crash are not equal probabilities. This is demonstrated by looking at the *relative risk* of each explanation.

From my perspective as an epidemiologist and a crash reconstructionist with a background in biomechanics, I can assess the risk of a cervical disk injury in a minimal-damage rear-impact crash based on the use of crash injury databases. For most low damage crashes, this risk ranges from about 1 in 15 to 1 in 100. So we know the injury is possible, but it doesn’t happen in every case.

In order to understand the chance the same injury would have occurred *but for* the collision, we ask, “What’s the risk of the same injury occurring from some other cause – such as rolling over in bed, or from the spontaneous activation of pre-existing degenerative condition – *on the same day*?” The pre-existing condition has been there all along, and your client has been rolling over in bed all her life, so what’s the chance that on *that particular day* she rolled over and injured her neck, or that the pre-existing asymptomatic condition would suddenly become symptomatic?

Here’s an example of how this is applied practically. Let’s use an example of a 30-year-old man who has a surgical disk injury in his neck after a minimal property damage rear impact collision. We can look at the crash forces and conclude that they would be associated with no less than a 1 in 100 risk of injury. Let’s also say that the man had a neck injury more than 10 years before this incident, which lasted a few months, but he’s had no neck pain for the past 10 years. We now have a general idea of the risk of injury from the crash. But we also need some idea of the chance this man would have developed neck pain on the same day as the crash – if the crash hadn’t happened.

One way to do this is to imagine that we had met the man the day before the crash and were asked to estimate the chance that he would spontaneously get neck pain leading to a surgery in the future. The annual incidence of neck surgery in this population is less than 1 in 1,000, but the man did have a prior history of neck pain 10 years earlier. So we can say his risk is somewhat higher than the average man of the same age, say 1 in 500. But if we really want to bend over backwards to favor the defense (so that we don’t make an error in favor of the plaintiff), we can say that his risk of developing a surgical neck condition in the next year is 10 times greater; 1 in 50. Now we have to break that 1 in 50 into 365 days, because we want to know the daily risk. Thus, the chance of a high-risk 30 year-old man developing neck pain leading to neck surgery is 1 in

18,250. In comparison with the risk of injury from the crash, which was conservatively estimated at 1 in 100, the crash is 183 times more likely to be the cause of the need for neck surgery.

So when the defense uses the middle ground fallacy to tell a jury that most people aren't hurt in similar crashes, and the return of neck pain requiring surgery was purely coincidental because of the prior history of neck pain, it can be easily shown that an evaluation of the defense's theories shows the defense would be wrong 182 out of 183 times – or more than 99 percent of the time.

You certainly don't need to hire an epidemiologist for all of your cases to expose the middle ground fallacy. The same information can be elicited from treating physicians, and it can even be used to cross-examine the defense medical evaluators, as follows:

Doctor, what's the chance that my client was going to develop neck pain at the exact same time as the crash? Not very likely, is it?

No.

Did you take a history from him?

Yes.

He was doing great the day before?

Yeah.

He was doing great the year before, wasn't he?

Yeah.

So what's the chance he's going to show up on that particular day with neck pain if the crash not happened? More likely than not?

No. But he had preexisting osteoarthritis.

There's your most common defense argument, right? Preexisting osteoarthritis. So you ask,

Most people have preexisting osteoarthritis?

Yes.

Does preexisting osteoarthritis make your neck or the joints in your spine stronger or weaker?

Weaker.

Everybody's going to admit that.

If you don't have any pain in your neck, and preexisting osteoarthritis has made the neck and joints weaker, are you more or less likely to get hurt in a crash like this?

The defense always argues that preexisting osteoarthritis makes you very susceptible to injury. That's their defense medical examiner's conclusion. The plaintiff could

have just rolled over in bed or sneezed; somehow, the injury and need for surgery was inevitable.

This is where the defense holds up photos of a scratched bumper, or presents testimony from a biomechanist who says that the crash couldn't have caused the injury – in direct contradiction to the defense medical examiner's testimony that *anything* could have caused the pre-existing degenerative changes to become symptomatic. I call this the reverse Kryptonite theory: Nothing but Kryptonite can hurt Superman. In minimal damage auto injury litigation, the defense argues the opposite: Everything *but the crash* can hurt the plaintiff. The crash is reverse Kryptonite.

I believe that understanding and exposing this important fallacy (middle ground) that underlies the MIST defense is critical to helping jurors understand how the defense theories are both deceptive and contradictory.

The second most common fallacy I encounter is somewhat related to the first, called *Transposed conditional*. This means you have erroneously swapped around terms in a conditional statement. Sounds fancy, but it's not really. Consider the following true statement: "All fractures result from trauma." No reasonable person will argue with this (and for those of you thinking of spontaneous fractures in osteoporosis, they still result from trauma, just of a lesser amount), and all lay people and experts will agree. If the terms of the statement are transposed, the conclusion is, "If there isn't a fracture then there has been no trauma." This is obviously false, but this concept is often raised by the defense in their use of radiologists in order to claim that there is no sign of recent trauma on an MRI of the spine of the plaintiff. So this true conclusion is contorted into the reverse, which is that if there is no sign of trauma on the MRI then there was no injury resulting from the crash.

This makes me think of when my wife asks me to get something from the refrigerator, and I have a case of what comedienne's call "male refrigerator blindness," so I say I can't find it. The chance that the item is not really in the refrigerator is virtually nil, as my wife invariably proves to me in about 5 seconds of looking.

In the same vein, when a plaintiff has pain right after a crash, a diagnosis of injury to a spinal disk and MRI findings that the treating physician finds to be related to the symptoms, the defense radiologist's claims to not see anything traumatic on the MRI have virtually no meaning at all. Most painful disks look just like non-painful disks, and MRIs cannot differentiate between one that was non-painful before a crash and one that became painful after a crash.

In a MIST case, the defense rarely claims that injury was impossible, even when there is no property damage; they typically settle for the assertion that an injury was unlikely. The fact that this is a misuse of how we normally use probability is easily demonstrated with this simple example: Consider an 80 mph crash into a tree, a crash in which we could say that 99 out of 100 people would be killed. It is absolutely true that survival is very unlikely from such a crash. Why, then, don't we bury the one survivor? Because it doesn't make any sense.

In the same vein, does it make any sense when the defense argues that in a crash where only one out of 100 people is injured like the plaintiff, we should pretend that the one person who is injured doesn't exist or wasn't really injured? Isn't that burying the survivor all over again?

The jury needs to understand that the defense is asking them to do something unnatural: They're being asked to agree that if *most* people are like this, then *everybody* is like this.



DOROTHY CLAY SIMS

Dorothy Sims is the founding partner of Sims & Stakenborg, PA, in Ocala, FL. Ms. Sims is frequently invited to conduct private, in-house seminars for lawyers and law firms on researching and cross-examining experts as well as the use of technology and the practice of law. Lawyers throughout the U.S. use Ms. Sims to prepare mediation presentations and suggest methods of cross examination. Ms. Sims is also retained in criminal cases to assist the defense in cross-examining the state's forensic experts. She has been AV rated by Martindale-Hubbell, the highest rating a lawyer can achieve. She wrote Exposing the Deceptive Defense Doctor, a best seller for three years in a row. She cross examines defense experts for other lawyers, and has presented hundreds of seminars on how to expose dishonest experts, and frame that dishonesty so the jury cares.

CHAPTER THIRTEEN

Reptiles, Low Impacts, Defense Lawyers, Adjustors, and Experts – Featuring the Infamous Letter from Hell!

The Reptile does not like:

- Lies
- Hypocrisy
- Betrayal

With many DMEs (alias: IMEs), it's easy to prove they've engaged in all three.

When you do, a case that might not otherwise bring high dollars becomes more valuable. The jury will neither like nor believe the DME, and this can color whether jurors go on to believe *any* defense expert.

The techniques in this chapter will help you uncover the lies, hypocrisy and betrayal, and frame them so that the jury *cares*.

RESEARCHING MEDICAL CODES OF ETHICS TO FIND RULES

First, as the *Reptile* book and *Damages 3* teach,⁶⁸ you need to establish the Rules that medical experts must follow. Begin by downloading links to codes of ethics at <http://ocalaw.com/resources/>. Those are your Rules, created to protect the community from harm by unethical and dangerous doctors.

Check your state's medical board and the local board of psychology for some great language. Many "experts" have never read the law regarding their own profession, and it shows.

Books on how to conduct medical examinations can be another source. Many specialties have publications that list the steps for evaluations. (For example, the American Psychiatric Association can lead you to books on how to conduct an examination on a patient with suspected PTSD.) Specialty websites also offer articles on how to perform examinations for various kinds of diagnoses. For example, if the spine is at issue, search

68 P. 209 ff in *Reptile*, and 205 ff in *Damages 3*.

for publications that instruct that the doctor should look at the patient's back (many don't!), palpate for spasms, check for range of motion, measure for atrophy, etc.

Then prepare to show what the necessary steps are, who must follow them, and how your own doctor followed them.

DEALING WITH THE RELUCTANT TREATER⁶⁹

Meeting with the client's doctors can be frustrating. Sometimes the doctor refuses to talk to you. This may make you nervous about deposing the doctor or calling him to trial. What's going on? Why do the doctors behave that way? And what can you do about it? When working with these folks, it's important for you to know their concerns. To begin with, some doctors truly *hate* trial lawyers. You:

- are the single reason his premiums increased (yes, they drink the Kool-Aid)
- are the reason his employee sued him for worker's compensation when she wasn't injured
- represented his ex-wife and destroyed him
- can do things to him that result in him completely losing control of the situation
- subpoena him for silly things – and then don't pay for his time

Sometimes I think doctors have their own special code for trial lawyers: *mugger*. I've attended medical society meetings with my husband, a physician. I cringed as I heard the audience bash our entire profession. Apparently, the trial bar is responsible for the Great Depression and global warming. The insurance industry has succeeded in pitting doctors and lawyers against each other – though if our professions worked together, we could do amazing things (including bringing about insurance accountability).

WHAT DO YOU DO WHEN THE TREATER IS RELUCTANT?

You go off-Code. You show that you're not the *typical* trial lawyer. How do you do that?

- a. Before asking for a conference, send in the client to thank the doctor for his good work. Have your client explain *why* you need to talk to the doctor, so the doctor does not worry he's being set up for a med mal case.
- b. Honor the fact that the doctor's time is valuable: Offer to pay for his time in advance. Explain that the conference will be brief and you just want to explain to him the kinds of things the defense may bring up in cross-examination. Good forensic doctors appreciate this, because you're helping them avoid humiliation. Unsophisticated doctors don't understand that a deposition is more than recitation of notes.

69 See also Don Keenan's Chapter Fourteen below.

If you show the doctor at the start that you both are allies on the side of truth, and that you can help him, he'll be more open to meeting with you.

- c. At the beginning of your conference with him, thank him and tell him your patient is grateful for his care.
- d. Don't mislead him. Tell him the good and bad so he is not caught unaware.
- e. Keep your promise to keep it brief. Even doctors who like you would rather spend the time treating patients.
- f. Tell him what you expect the defense will do or say, so he feels prepared.
- g. Docket the deposition in plenty of time, and make sure you don't do a last-minute subpoena for trial. Doctors hate that.
- h. Watch how you speak to the doctor's receptionist. At parties with doctors, I hear doctors' spouses tell stories about desperate lawyers trying to book appointments. "The lawyer was so rude to me, I refused to set the appointment," one said, laughing. Presume that whoever answers the phone is married to the doctor. If you failed to pay for a previous conference or testimony, you have a problem.⁷⁰
- i. If you need the doctor to make a referral, don't *tell* him to. That translates into "You don't know what you're doing, so I, the trial lawyer, will tell you what to do." Doctors, especially surgeons, don't like to be told what to do. So try something like this: "Doctor, I found some articles on your specialty website about DTI. You know more about this than I do, but I was wondering what your thoughts are about this [additional] test in light of this new information [give him the new information]," or, "My client is frustrated that the defense is accusing her of faking. We were wondering what you thought about referring her out for a [fill in the blank] test. This might help you defend your diagnosis if the defense attacks it."

All that having been said, when a doctor won't take the time to cooperate with discovery and conference even with a lawyer who will pay for his time, the doctor is risking his own patient's future medical care (the jury verdict). Usually when a doctor is that difficult, he has no compassion for the patient and will not be helpful on the stand. It's time to change doctors.

My suggestion is to find a good physiatrist (PMR) to take over care. Why? Because, as a newer specialty, physiatrists (for the most part) don't hate and fear lawyers. They don't do surgery so they don't get sued as often, and haven't developed quite as much hatred for trial lawyers. And physiatrists treat patients who have been "cured" by surgeons, so know better than to claim that surgery will fix every problem.

70 **Ball note:** And he will have trashed you with his doctor friends.

Physiatrists understand long-term care needs for life-care plans better than do other specialties, because they write the scripts for wheel-chair accessible homes, attendant care, and driving evaluations. PMR doctors know the kinds of services necessary for attendant care, because they often work with residential rehab facilities and nursing homes. Many surgeons and neurologists don't like to treat chronic conditions, so they prefer to refer patients with chronic conditions out to a family doctor. (Surgery and neurological testing pays more than do simple return office visits.) In contrast, PMRs follow patients for years and treat chronic pain.

HOW TO RESEARCH THE DME AND FRAME THE INFORMATION USING THE REPTILE

I was trying a brain injury case in California. After the verdict, a juror told us what I'd suspected for a long time: They don't *care* how much the DME is paid by the defense. The more money paid, they figure, the smarter the doctor must be. But the jury got angry, and completely discounted the DME once he lied about his income. The fact that the doctor made \$250,000 per year was OK. But when he claimed not to know if he may have made a million per year? That upset the jury. Because it's almost certainly a lie. And the Reptile doesn't like liars.

So when researching experts, it's not enough to show they do a lot of defense work, or that they may not really understand the medicine. You also need to show that the doctor *lied about it*, and a lying doctor is a dangerous doctor. Further, when you show he doesn't have a clue about the science behind his testimony, he is also dangerous to the community.

The closest metaphor for a bad defense doctor is "whore." Your job is to show the jurors how much the bad doctor is behaving like a prostitute. So let's look at what prostitutes do, and then how we can show that to jurors:

WHAT DOES A PROSTITUTE DO?⁷¹

- a. Works for a pimp (insurance company)
- b. Screws someone (over, like the plaintiff)
- c. Charges for it
- d. Looks for future business (i.e., from the insurance company)
- e. Doesn't care about the ethics of his/her behavior – only the money
- f. Doesn't care about the customers – only the money
- g. The more customers s/he services in a day, the more successful she is (the more money she makes)

71 See also Keenan Edge, p. 131 – "What the Reptile Hates."

Now let's look at how to show these things to the jury:⁷²

a. *Works for a pimp.* Ask the DME:

In the bulk of your cases, the DMEs are referred by the defense industry, correct?

b. *Screws someone.*

It would hurt the patient for you to under-represent the extent of her injuries, wouldn't it?

It would hurt the patient to deny her the needed medical care, wouldn't it?

It would hurt her for you to testify in such a way that patient is denied enough funds to pay for her future medical care, wouldn't it?

And you wouldn't want to do that to her or anyone else in your community, would you?

c. *Charges money for it.*

In this case, you charged \$10,000?

Your physical exam lasted 10 minutes?

That's what . . . \$1,000 per minute?

You demanded up-front payment?

d. *Looks for future business.*

You give free seminars to defense attorneys and the defense industry?

To get future referrals?

You make a lot of money from the defense, don't you?

You would like that to continue?

How often do you think you can admit something is wrong with a patient and still get those referrals?

e. *Doesn't care about the ethics – only the money.*

How complete was your exam of the patient?

How complete was your examination of the facts of the case?

Where is the publication saying you don't have to perform all the steps before reaching a conclusion?

72 **Ball note:** The process Dorothy uses here is the way we handle Codes (see *Reptile* Chapter Seven). The Code for DME is not whore. But showing jurors that the DME has the characteristics of whores – without your using the word “whore” – is extremely effective.

f. *Doesn't care about the people—only the money.*

Should you treat patients with compassion?

Show me where, in your report, you treated my client with compassion when you accused her of being a liar (malingerer).

You weren't hired to treat her, were you?

Or to help her get better?

You have no doctor-patient relationship, do you?

You saw her one time, correct?

g. *The more customers serviced, the more successful the prostitute (the more money earned).*

How many of these defense exams have you done in the last year?

In the last 10 years?

You could have spent that time trying to *help* patients?

But you chose to spend it helping the defense, yes?

USING CODES OF ETHICS AS RULES WHEN DEPOSING AND EXAMINING DMEs

Page 140 of *Reptile* makes a good primer about how to start a deposition or trial cross.

1. In deposition, get the DME to agree to the code of ethics, as well as with the Hippocratic Oath which says, "First, *do no harm*." In other words, a doctor must never use the tools of his profession to harm anyone.

2. Then get the DME to agree:

Are the codes of ethics a set of rules?

Some DME's will claim they're "suggestions." So the jury sees that this doctor believes he doesn't have to follow an ethical code. So ask the doctor if he thinks he's not obligated to follow a code of ethics. After all, codes of ethics are rules regardless of what the doctor says.

These ethics codes were adopted to protect the community, correct?

Do you think you must abide by those rules?

Where is the publication saying you don't have to follow these rules?

Do these rules say you shouldn't lie?

Do these rules say you don't have to do your best?

Do these rules say it's OK to lie?

Do these rules say you should practice outside your specialty?

Failure to follow these codes can subject the patient to needless harm, yes?

How often do you recommend subjecting a patient to needless harm?

For example, if you are not trained in pediatric neurosurgery but do it anyway, you can risk a child's life, can't you?

A doctor who does not follow the rule that says read all the records can harm patients, right?

When a doctor whose specialty does not include diagnosing appendicitis ignores symptoms of appendicitis, he's needlessly endangering the patient, right?

Or he can cause a middle-aged teacher to go blind, because the doctor is not an expert at diagnosing a condition, and didn't refer the patient to someone who was?

Or cause harm by ignoring an older man's complaints of low back pain, concluding that the patient was exaggerating, but then the man dies of prostate cancer diagnosed too late?

Here you are giving specific examples that do don't relate to your case, but they spread the tentacles of danger so the jury sees how medical code violations affect their personal safety as members of the community safety.

When a doctor doesn't follow the rules, it can harm a teacher?

A student?

A nurse?

Mother?

A grandfather?

A mechanic?

Page 213 of the *Reptile* book offers a more in-depth discussion.

3. Next, drill down as to what the DME is *not*. Let's say the expert is a neurologist on a brain injury case:⁷³

You're not a psychologist, are you?

You can't interpret the plaintiff's psychological testing, can you?

Does your code of ethics tell you to ignore testing you don't understand?

Doctor, show me in your report where you discuss the tests given by the plaintiff's psychologist and her conclusions based on those tests . . . the tests *you don't understand*.

[Ask this when there's no such discussion in the report.]

Ignoring testing you don't understand can needlessly endanger a patient, yes?

73 **Ball note:** See Chapter Five for brain injury in MIST cases.

So, for example, if you did not know how to read a mammogram and the radiologist wrote a report saying “mammogram suspicious for breast cancer,” you won’t throw it in the trash and send the patient home just because you cannot read mammograms, would you?

You’d refer the patient to a specialist?

Because if you did not, the patient could die?

And that death could be preventable?

Doctor, you don’t know the training and education of the plaintiff’s psychologist versus the defense psychologist’s, do you?

And the *safest* way to evaluate the patient is to presume that the plaintiff’s psychologist is correct, yes?

Because if you ignore the plaintiff’s psychologist, and rely on only the defense psychologist who says there’s nothing wrong, you could miss multiple serious conditions?

Show me where you considered the treating psychologist’s findings, and incorporated them into your conclusion.

You’re not a psychiatrist?

You did no psychiatric testing?

Conducted no psychiatric examination?

Is it a good idea to ignore the conclusions of the psychiatrists who did tests and examined the patient?

Doesn’t the code of ethics say at [*cite the place in the code*] that the expert must not misrepresent his findings?

Do you agree with this?

What do you think should happen to people who violate this code?

This makes the witness nervous because he knows he probably violated it, so he’ll wiggle and evade.

Do you agree that misrepresenting a patient’s condition needlessly endangers the patient?

Can pretending someone is fine when, for example, they need an immediate appendectomy, harm the patient?

Minimizing symptoms can also subject a patient to needless harm?

You said my client’s herniation was “minimal”?

Where in your report did you acknowledge that the radiologist called it “significant”?

Where in your report did you admit that my client was diagnosed with [*specify*]?

Can ignoring medical science have the same effect?

Does failure to fairly research the condition needlessly endanger the patient?

Does failure to fairly research the likely causation needlessly endanger the patient?

If the defense could have found an expert who could properly followed the steps of his own profession, don't you think they'd have used that expert?

By relying only on articles helpful to the defense and ignoring the others, you increase the risk of reaching a wrong diagnosis, yes?

Show me the articles you copied and spent the time to read that support what the patient's own doctors are saying. What? You don't have any?

Are you using only biased research provided by defense?

UNDERMINING THE DME'S HONESTY ABOUT HIS INCOME

When conducting background research on the DME, get some idea of his income as a DME. If he denies it in deposition, you have dishonesty. Remember, the Reptile doesn't like lies.

When the DME claims he doesn't know how much he makes but won't deny it's over a million dollars a year, it's not believable.

If he claims that even if he did make that much money, it's not possible for it to cause unconscious bias – that's even less believable.

Remember, Reptiles don't like liars. Liars threaten survival. If you can show five clear lies told by a DME, the jurors won't cotton to the DME or the horse he rode in on. The jurors will be offended that the defense even suggested this expert.

GETTING THE MOST OUT OF A BAD DEFENSE EXPERT

Of course, once you've done a kick-ass deposition, the defense will probably try to "fix" the situation by not calling the bad DME to trial. So instead, *you* call him – as an adverse witness. Do it the day after, or even the day of, the mediation. The DME will call the defense attorney in a panic, and – to avoid facing your cross-examination in open court – will probably encourage the defense to settle.

This tactic serves multiple Reptile functions.

1. It causes fear on the part of the defense attorney and the adjuster, because this generally happens only when the DME is really bad. (And you made him really bad!) The defense thinks they can do damage control by not calling the DME to trial. *Too late.* You did it.⁷⁴ This causes a split between the adjuster and the lawyer. Often the lawyer chooses the DME, so when the DME is bad, the adjuster gets mad at his own attorney. This causes fear on the part of the lawyer that his firm may lose

74 **Ball note:** Be sure your venue allows you to call him. Not all do.

the account. Losing one case is no big deal. But losing all of AIG's work in a single phone call? Cause for concern.

2. It stirs up fear and distrust on the part of the attorney and adjuster, because once you've exposed one DME for the hack he is, they both realize it's just a matter of time before you do the same thing to all their other witnesses. So it's often not a bad idea, especially in small cases, to depose first the DME you know the most about. Exposing a DME's weaknesses early on sends a message to the defense attorney that the case needs to settle, and also results in great quotes you can use on all the other doctors whom you may not have time to research as thoroughly.

Here's a way to do that:

Q: Dr. Smith, you deferred to Dr. Jones, the defense radiologist. Did you know he could not get accepted into a single medical school in the United States?

A: No.

Q: Did you know Dr. Jones flunked his medical board certification test?

A: No.

Q: Did you know Dr. Jones flunked his medical board certification *twice*?

A: No.

Q: Do you have enough information about Dr. Jones's training that you can say Dr. Jones is better trained than the plaintiff's treating doctor?

A: No.

He has to answer this way, because he knows this might be just the tip of the iceberg about Dr. Jones, so he doesn't want to defer to him anymore. Dr. Smith is looking for a way out. Give him one:

Q: As an unbiased scientist, you have to weigh every expert's opinion fairly and evenly, correct?

A: Yes.

Q: Do you have evidence that the treating doctors are less trained than Dr. Jones?

A: No.

Q: Do you have evidence that the treating doctors are less competent than Dr. Jones?

A: No.

They always say no because they don't want the treaters to sue them.

Q: That being the case, you won't find Dr. Jones's testimony any more persuasive than the treater's testimony, correct?

A: Uh, that's correct.

Now ask Dr. Smith whether he knew that the treating doctors diagnosed the condition, found causation, etc. Of course he knew; you're just reminding him now that he can't dismiss the treating doctor as he'd planned on doing – because now he wants to prove he's an "unbiased scientist." (And the moron he was initially deferring to just lost his credit rating.)

Show me where you considered the conclusions of the treating doctors in your differential diagnosis. (*He didn't.*)

Now ask about how a biased scientist who doesn't follow the rules can harm the community.

If you do go to trial, you'll show how no one can follow the rules and come to the DME's conclusion?

Bring a phone book. Use it to show the jury how the defense could have hired someone who actually treats patients.

GETTING THE MOST FROM YOUR OWN EXPERT⁷⁵

First, make sure your own expert:

- a. Took the required steps to do a scientific analysis (reading all the scans, all the records, all the depositions).
- b. Actually examined the patient, can explain the exam step by step (examined patient, talked to family members, talked to other doctors, engaged in differential diagnosis) and can explain why the analysis and examination matter (because if you skip steps you expose the patient to needless harm by decreasing the accuracy of your diagnosis). This can mean depriving the patient of proper treatment.
- c. Can explain, and give examples to show why, failure to properly analyze and examine can cause harm. For example, failing to properly evaluate all the issues might make the doctor allow a brain-injured patient with vertigo to drive a car, putting others in the community at risk.

DUMB LOW-IMPACT DEFENSES AND THE REPTILE

1. "THE CRASH WAS TOO MILD TO CAUSE THESE PROBLEMS"

Point out:

1. All the factors that play into injury severity – type of crash, speed, location of plaintiff's body in space, plaintiff's body type.
2. The defense has *no idea* about many important specifics of the crash (such as where the plaintiff's body was in space, speed at impact, vehicle weights, body type, etc.). Without these facts, the defense can't determine causation – but claims they can.

⁷⁵ See more on experts in *Keenan Edge*, Chapter Thirteen.

3. Since you've established that the DME should follow the rules (codes of ethics), you can now point out that the DME is not an accident reconstructionist, *but is giving an opinion on it anyway*. Why not tell us all how to build a particle accelerator from crayons and a toothpick? That would be just as scientific. He has violated his code of ethics by not having all the facts before announcing a conclusion, and by testifying about an area in which he is not trained. Would he refer a member of his own family to a doctor who did that? Explain how practicing medicine like this can harm the community. What if a doctor who isn't an expert on contagious viruses concludes that a highly contagious SARS patient has no condition so she can go back to her job as a third grade teacher?

The techniques in the *Reptile* book show you how to help the jury *care*. That can happen in DME cross examinations. Consider: A bad DME can conclude that the crash was too mild only if he 1) ignores the effects of crash, 2) ignores the time relationship of symptoms to crash, and 3) assumes the plaintiff is lying. So ask the DME whether using the "mildness" of the crash as proof there is no injury is like saying that a low impact crash that kills a passenger would prove that the passenger isn't really dead.

Show an autopsy photo of a plane crash victim. Since most people don't die in plane crashes, perhaps this man isn't dead either? The "too-mild crash" defense has to be taken to the absurd for people to see the big picture.

4. Does the expert deny that being in a crash exerts more forces on the body than if the crash had not occurred? Where is that factored into the expert's analysis? You can usually show that the analysis was sloppy and dangerous and doesn't follow the rules.

2. "MOST PEOPLE AREN'T INJURED IN A CASE LIKE THIS"

This is just plain stupid because your client is and *was* injured. It's like saying "most people don't die in plane wrecks." I'm looking at a plane wreck, and I'm going to call the families of the deceased and tell them their family members aren't really dead because *most people don't die in wrecks*.

Ask: "If your gas grill catches on fire, do you ignore it because *most grills* don't catch on fire?"

The object is to show the jury how the harm is real, and that ignoring it is dangerous to your client and to the community. If someone shows up at the doctor's office with TB, is the doctor going to ignore this contagious condition because "most people don't have TB"?

3. "THE PATIENT WILL BE HEALED WHEN THE LAW SUIT IS OVER"

The expert who says this is exceeding his training, claiming to be the "Medical Miss Cleo" who can predict, without science, how your client will be in the future. Sadly,

many plaintiff's lawyers often let experts do this – perhaps because the lawyers themselves do not really understand how serious a low impact case can be.

My husband treated a man who was in a 10 mph crash. The pre-existing arthritis in the patient's spine was so bad he was rendered a quadriplegic at the moment of crash. No settlement of any damn law suit was going to regenerate his nerves. Just this week I was studying for a driving test and in the manual was a statement that a head injury in a 30 mph wreck is the same as falling from a three-story building. The bad DME ignores such facts and favors misleading rhetoric and pseudo-science.

This defense also involves the DME playing a game: Calling your client a liar without saying it in so many words. Your goal is to show the jury exactly what this expert is doing – insinuating that your client is only “suffering” until the jury comes back.

Deal with this dumb defense strategy with the DME on the stand. Ask him to call it what it is:

Are you saying my client is faking his pain?

Are you saying everyone heals the same way, every time, after a crash?

Do you agree that on the day of the crash the pain was from to the crash? [*He will say yes so as not to appear unreasonable.*]

What day and hour please, did the pain stop?

Did the claim of pain become a lie?

Did my client no longer have pain, even though she told her doctors she did?

What day will my client's pain disappear?

Are you saying it will disappear the day the law suit is over?

That morning?

Afternoon?

Show me the medical literature that says this condition will be permanently cured on that future day when a lawsuit is terminated. (*The phrasing of the question makes it clear just how stupid this position is.*)

Be connected to the internet when you ask this question. Offer your laptop so the DME can try to find a scientific citation. This shows the jury that the DME is avoiding science and reality.

A doctor who ignores medical science is violating the rules, yes?

Doctor, show me where there is any article in any peer-review journal written – ever – that supports the claim you just made. [*There is none.*]

Before you make a claim like this about a condition like this, isn't it safer and more prudent to research the science to make sure you are up-to-date and that your conclusions are scientifically valid?

If you don't research the science and keep up to date, you might still be telling surgeons they don't need to wash their hands before surgery, wouldn't you?

Walk us through the anatomy of how the resolution of a lawsuit cures a herniated disc, torn rotator cuff, etc.

Are you psychic enough to predict my client's pain level?

What is my client feeling right . . . [*wait 4 seconds*] . . . now?

Show me the records where anyone, other than people like you who are hired by the defense, thinks my client will be cured when the lawsuit is over.

4. "THE PATIENT IS EXAGGERATING"

This is another version of the DME calling the patient a liar without using the word.

If the DME harms the patient – and if he doesn't care – he violates several Rules.

First, he violates the Hippocratic Oath (do no harm). Calling someone a liar to keep her from getting money for medical care does harm. It certainly never *helps* plaintiffs to call them liars.

Furthermore, *there is no way the doctor knows what is in your client's mind*. So the doctor himself is being dishonest – another Rule broken.

Specific concepts are easier for jurors to understand than the stock phrase "pain and suffering." Jurors know what it is to suffer from humility, loneliness, and not being mobile. So show how the crash caused these problems, and how the DME caused further harm by calling your client a liar.

When the DMR implies dumb defense No. 3 or 4, this next series of questions is useful:

Doctor, malingering means intentional misrepresentation for gain, correct?

That's the same as lying, isn't it?

You are calling my client a liar, aren't you?

You'd be lying to deny it, right?

Did my client fake or malingering on the following: [*List brain scans, MRI's, abnormal reflexes, spasms, etc.*]?

Please identify the doctors who actually treated my client, saw him more than once, had a doctor/patient relationship – and who said she was faking.

Doctor, if you are claiming my client was lying, that means you claim to know what my client was thinking, correct?

Let's say you are wrong. Let's say my client is really injured, in pain, and in need of medical care. Wouldn't you agree that accusing her of lying has the potential to harm her?

She could be charged with insurance fraud, perjury, correct?

Those are felonies?

They carry prison terms?

If her family believes you, they might refuse to have anything to do with her?

That can be very lonely, yes?

That's a kind of harm?

Especially if she is not a liar?

If you call her a liar and she can't get medical care, she stands the risk being even more immobile, doesn't she?

Doctor, being accused in open court of being a liar is humiliating, isn't it?

So if my client is already depressed and suspicious of medical doctors, that accusation can make her depression worse, can't it?

Doctor, isn't it the safest course of action to presume the patient is telling the truth?

Doctor, when one of your own patients says back pain, do you send her to a psychologist to test for 'malingering'?

You start out believing the patient, don't you?

Doctors can exaggerate too, can't they?

THE REPTILE IN MEDIATION

Here's where the fun comes in.

"REPTILING" THE DEFENSE ATTORNEY AND ADJUSTER

I had a case where the plaintiff could not be more unattractive. He had a criminal history – a very, very bad criminal history that we could not keep out. He also had a serious prior brain injury. The rude, arrogant defense attorney was certain he would prevail in trial.

David Ball spoke to me the night before the mediation and told me to "*Reptile the defense attorney.*"

I soon realized that I had more than 300 PowerPoint slides prepared to prove the case, and the defense attorney had none. I showed the adjuster how worthless his own attorney was, and I showed the attorney how much more prepared I was than him. (Equivalent to pitting the adjuster against his own attorney.)

The defense attorney got so agitated that, midway through the mediation, he told me I could no longer speak to his client, and they were leaving the room. But his client elected to have the slide show continue and stripped the defense attorney of his power.

Then, during a break, I told the defense attorney (who was a junior colleague at his firm) that I was going to depose the insurance adjuster and ask whether the junior defense attorney was billing the insurance company for the deposition at senior partner

rates. And if so, I would ask whether the adjuster knew *that the senior partner never attended a single deposition?* Five minutes later, the defense attorney walked out.

I waited three days. Three long days. Ultimately the angry lawyer came back, after convincing his client to settle (to keep the client from realizing how dishonest the lawyer had been).

So remember that the Reptile applies in mediation as well as in trial. The adjuster's Reptile could care less about your client. Slides of a sad child who misses his impaired parent do nothing for an adjuster. But slides showing the stupid statements his own experts have made, followed by slides that show what juries do when they hate defense experts (they award larger verdicts) cause concern. The adjuster does not want to explain why he could have settled the case for \$2 million and instead had it tried to a verdict of \$10 million, with fees of another \$1.5 million.

For this to work your slides must be credible and cite the page and line of the deposition, so there is no question of distrust on the part of the defense.

You must also be over-prepared (this will reduce trial preparation), so the defense attorney will become afraid to try the case, realizing you are better prepared than he or she is.

BRINGING AN "EXPERT" TO MEDIATION

A good technique: Bring in a doctor by internet to speak to the parties and explain why the defense experts are wrong. This will:

- a. Explain reality, which has probably
- b. not occurred to the adjuster; if it had, the adjuster would have suggested settlement.
- c. Shows everyone you know how to think outside the box, and creates concern about what else you are capable of doing.

In every single case where I have arranged for this to happen, the case has settled. For those cases where the defense attorney has minimized risk to the adjuster, this technique makes the adjuster lose faith in his own attorney.⁷⁶

THE LETTER FROM HELL

My friend Bob Joyce asked me to help him cross a doctor in a brain injury case. The case was not a big one and most people would not have brought me in on such a case. But Bob was mad. And when he got mad . . . he got powerful.

⁷⁶ **Ball note:** Adjustors who worry most about being wrong are those who work on MIST cases: they're at the bottom of the ladder and – when they're badly wrong – they have nowhere to go but out. Applying the Reptile to their sorry asses can be satisfyingly effective.

Now is the time to get creative and show them how stupid they are and how smart you are. A great example of this is reflected in a letter Bob wrote to the defense attorney in his brain injury case.⁷⁷ It's the kind of letter you need to start writing.

Because the Reptile brain is primarily concerned with survival, a sense of smell is critical. I'm convinced defense experts, defense attorneys, and adjusters can "smell the rage." If they realize you care more, will work harder, and are less predictable because you are angry, they can't cost it out or predict what will happen. They know that in most soft tissue cases, juries come back with modest awards. But you aren't behaving like *most* plaintiff lawyers.

(I asked Bob if the Reptile theories formed the basis of the letter. "Of course," he replied. This lawyer knew that if he showed each of the parties to the defense the weaknesses of the other attorney's position, he would divide the adjuster from his lawyer and cause the adjuster to be suspicious of his own attorney. Bob would also cause the defense attorney to be afraid of a possible malpractice law suit, motivating the attorney to try to settle.)

Here's the email Bob sent me, describing the letter.

The back story is I sent him a demand letter before Christmas that explained how he has screwed up the case including, but not limited to, hiring an expert that flunked the FLEX exam twice! I pondered in the letter if he had done his homework. Moreover, I requested an affidavit by 1/10/13 that there is no more insurance than the \$ ____ Mil. I said in the letter that he had an insurance problem, in that he did not have enough insurance. I enclosed in the letter a copy of his verdicts against him and pointed out that he continues to lose with regularity, and lose big! (All of this is in the letter.) Finally, as a condition precedent to settling, I said he had to forward this letter to the carrier and his insured. Ouch!! Ouch!!!

Why was Bob's letter successful? Reptile! It invoked fear in the defense attorney.

Fear that he would lose the case (again). Fear that his client would find out about his bad choices for DME's. Fear that a small case had now become a big case because he picked a terrible expert.

And he was going to get blamed for that.

Here's the text of his Letter from Hell.⁷⁸

Dear Mr. Defense Attorney:

As you know, we have an upcoming mediation in this case on _____. The purpose of this letter is to make it clear that we will still settle for the policy limits

⁷⁷ **Ball note:** Every MIST case is a potential brain-injury case unless you ignore it. See Chapter Five above.

⁷⁸ Names and dates redacted.

of \$____million, assuming you provide me with proof that there is no other coverage available to _____ and/or the defendant. Our offer to settle for the policy limits will expire as of 1/10/13 at 5:00 pm.

(Please provide me with a signed sworn affidavit that there is no umbrella policy or any other type of policy of insurance that may cover _____ and/or the defendant for this accident before the mediation as condition precedent to us settling the case for the policy limits.)

Please allow me to address several points:

You do not have enough insurance.

First, we have a proposal for settlement that we will surely exceed. I am aware that you will try to attempt to paint me with the broad brush that it was done in “bad faith,” and therefore, is invalid. That has been your goal the entire time; meanwhile you have wasted hundreds of thousands of dollars of attorneys’ time and well in excess of \$300,000.00 in collective costs because of your bad faith failure to accept liability in an obvious liability case. I wonder if you have passed the letters that I have sent you to the carrier on this point, but at a later date, they will surface and will not play out well for you. As you well know, we repeatedly asked you to accept liability. Moreover, you accused me directly and indirectly of “holding back” witnesses. Of course, that is ridiculous because if I had the name of Mr. _____ or Mr. _____ I would have given them to you from the onset so I would not have had to go through all the other discovery just to find them. Think about it, the more efficiently I can work the better it is for me. If I had someone from the onset who would put liability on your client, I would reveal it. Nonetheless, you continued along those lines. All the while, your client is paying you, and all the other lawyers and paralegals that you have working on this case.

Curiously, you had a paralegal take the statement of Mr. _____, a key eye witness, rather than you do it or have a trained investigator. Then, you were surprised when Mr. _____’s statements were different than what a secretary could get from him over the phone. If you were serious about taking on the issue of liability, why would you delegate to a secretary the job of taking a key witness’ statement? (I am attaching the deposition wherein you clearly state that your secretary took the statement.)

I get on a daily basis three to five correspondences or pleadings and papers. I am confident that you do not work for free. Nonetheless, the time, money and effort expended on liability, when liability was clear, could clearly be questioned as to why you did not put your efforts towards damages, as opposed to

liability. Of course, that has had an effect on me because my billable hours are extraordinary in this case because of your tactics. (Keep in mind my proposal for settlement.)

What really has driven this train, however, is that one time in the past, you were able to attribute a portion of fault in another case against a plaintiff where you were fortunate to do so. As you know, you sent me a letter, and, in fact, filed it with the court on more than one occasion, that says you are not admitting liability because in another case you were able to put fault on the plaintiff *“when he had the right of way.”* Obviously, that is not a good reason to deny liability when the facts of *this case* made it clear to any objective observer that your client was at fault. It was clear from the onset by the physical evidence. We did not need to waste a year of litigation on that issue and waste the money on accident reconstruction experts, but we did because of your advice to your client and the client’s insurance carrier. They took your advice and allowed you to run with it. Please read what the court said at the hearing on our motion for summary judgment on liability.

The court stated:

I spent 14 years doing insurance defense work. This carrier was my bread and butter. There’s no doubt in my mind what happened in this case.

And there’s no doubt in my mind if you make it go to a jury, a jury is going to answer that question for you. But I don’t think you are ever going to get to the jury.

I think eventually, if nothing else, he’ll depose your expert, and your expert will have to say on the record that he agrees that there’s no way that damage could have been caused to that vehicle with him (sic) running a stop sign, her running a stop sign.

There’s no question that your guy had a stop sign, the other car had the right of way and no stop sign. I don’t know how you can defend it on liability. I don’t know why you’d want to.

Of course, the court merely reiterated what I have been preaching all along.

I am very confident that our proposal for settlement is valid and there will be a very substantial award. The reason it is going to be so large is because you chose to fight a fight on liability that should have never been waged.

I routinely am awarded between \$600 and \$700 per hour pursuant to a proposal for settlement. It will be easy to document well over a thousand hours on this case. I am sure that you and your firm have billed the file extensively for all of the unnecessary work that we have been forced to go through because of your choices in how to litigate the case. (Please insert here, for example, the

20 motions *in limine* that you recently noticed for hearing, most of which were not well taken or moot. Moreover, you did not attempt to work them out with me before billing for them. As you can see in my previous letter to you on the subject, I agreed to many of them. So, it was a waste of time, money and effort to file them and notice them for hearing.) Nonetheless that is the posture we are in, so when you evaluate the claim, please factor in the likelihood of six hundred thousand (if not more) in attorney fees. These are your choices, not mine. You have chosen to fight everything that you can fight in hopes that I will give in.

Rest assured, I will never give in. Rest assured, I am ready to try the case.

The witnesses in the case are not favorable to you.

There are eye witnesses who I had to track down myself due to your insistence on continuing to deny liability. Clearly, Mr. _____ (the one your secretary interviewed) and Mr. _____ are not good for your clients. They both place the defendant as going almost double the speed limit. Mr. _____ saw your client run the stop sign. Of course, you wanted to get his eye records to suggest he was seeing poorly or did not see it all. You went so far as to have a hearing on the matter. The court summarily denied that attempt. More waste of my time, and your client's money.

Of course, that all becomes moot because the accident reconstruction experts hired in this case are largely in accord. (Please see what the court predicted above.)

You hired Mr. _____ as your accident reconstruction expert, and I found him to be largely unprepared and not helpful to your case. At the end of the day, he admitted that your client was negligent and speeding. (Consistent with what the court predicted.) Mr. _____, your expert, opined that the defendant carelessly ran the stop sign and hit our client going well in excess of the speed limit when she negligently plowed into the side of my client's vehicle. Mr. _____, our expert, clearly is the more qualified, prepared and persuasive witness between the two. Mr. _____ places the sole blame on your client. I am confident in prevailing on this point.

The court has already granted summary judgment on the issue of permanency; therefore, we will be entitled to economic and non-economic damages as a matter of law. I am surprised that you did not realize that damages are the real issue in the case until after a year of litigation.

Dr. _____, your nuclear medicine expert, was one of the top five worst experts that I have ever seen. He flunked the FLEX tests two times and you are putting

him forth as a hired expert in this case. Did you share with the carrier that the expert you hired is not well qualified and makes a poor witness? One could question, if you did your homework on retaining him. He will not be believed. He was not hired until the 11th hour, and, one could argue, because you concentrated most of your efforts on liability and missed the forest for the trees because the issue in this case is and always has been damages.

Dr. _____, your expert neuropsychologist, was not convincing either. As you know, I put on the record several months ago that he was going to find malinger because he always does. True to my prediction, he found that she was malingering. That will be a subject of our motion *in limine*, and I strongly suggest that he will not be allowed to make such a statement in trial. The problem with using a professional witness like Dr. _____ is that he has a lot of baggage and he is not believable. Many of things Dr. _____ testified about were inconsistent with what Dr. _____, your CME neurologist, testified about.

Dr. _____ may not even get to testify because of illegal ex-parte communications with my client's treating physician without my client's approval and in violation of HIPPA laws. Moreover, if he is allowed to testify, he said so many things that hurt your case, [that] I cannot state them here. Further, he contradicted Dr. _____ on many fronts. At the end of the day, he said that this case was a "gray area" case, and her symptoms could be explained because of a traumatic brain injury. Moreover, he had to admit that she suffered an initial brain injury in this accident.

The only witnesses that you have left are Dr. _____ and Mr. _____. They have not been deposed, but in my evaluation of the case, I anticipate that Dr. _____ will testify the scans are normal and Mr. _____ will say she needs very limited future care, if any. I am not concerned about them particularly because of the posture of the case in its present state.

Dr. _____, our radiologist, was the original reader on the SPECT and did an expert read on the other studies. I believe your firm has actually used his services in the past. At any rate, he will clearly explain to the jury that each of the scans is consistent with traumatic brain damage and her clinical picture.

Dr. _____ did the original read on the MRI of the brain and he will explain that she has residue of brain bleeds in the brain stem and in the frontal lobe

Dr. _____ did neuropsychological testing on her and he found that she had brain damage and her testing is consistent with the scans and her clinical picture

Dr. _____ did a life care plan for her and her future economic damages for her future medical care and for her future attendant care. If you add them up, you will see that they are quite substantial.

Dr. _____ is a *real* neurologist who was a Desert Storm participant. He is Harvard trained and he opined that she has traumatic brain damage. There is no baggage on him because he is not a “player” for purposes of litigation. He will be believed over hired experts, such as you have chosen.

Ms. _____ is a likeable witness who is the unfortunate recipient of your client’s negligence. Her life has been totally changed. In addition to the incredible orthopedic injuries, she has suffered life-altering neurological changes.

I have mock-tried the case on more than one occasion and on each occasion, our result has exceeded your policy limits. Please notify _____ that they are at risk for an excess verdict. Once the verdict exceeds the policy limits, I suspect all of the strategy in this case will be open for question, and if I am deposed, I will give truthful answers as to how I believe it was handled and litigated.

Your last move will be to move for a continuance, and use some pretext to blame me as the basis of the continuance. I would anticipate that coming once you realize I am serious about trying this case.

Please share this letter with _____ so they can get their own independent counsel so they know they can be extricated from this case, presently, without any exposure. The ability to settle for the policy limits of \$___million (assuming we get the affidavit referred to above) will expire at 5:00 pm on 1/10/12. At that time, we will no longer accept the policy limits and we will proceed to court. Moreover, as a condition precedent to the acceptance of the policy limits, we will insist that you share exact copy and all attachments of this letter with both _____ and the carrier prior to the expiration of the time demand.

I would suggest that you check my background. I try 7-18 cases per year on average and I almost always win. I am not bragging, I am just informing, so when your client gets a copy of this letter they can know what they are up against. Every year, I get multiple million dollar verdicts (or greater) for as far back as I can remember. I have tried over ___ jury trials and am board certified. I am very comfortable in trying this case. My client, however, would like to settle the claim, if possible. However, he will settle only if it makes economic sense. It does not make economic sense to settle for less than the policy limits in this case.

I have looked at your record and I have enclosed 27 pages from the *Florida Jury Verdict Reporter* from all reported cases that I could find. The record speaks for itself on verdicts against you:

\$1,720,000

\$2,030,000

\$1,830,000

\$4,500,135

\$5,193,690

\$297,724.00

\$25,000.00 (the best result that I could find in your favor)

Once again, it is my hope that we can resolve the claim, amicably. There will be a time, however, where we will not accept your policy limits. (After 5:00 pm on 1/10/12.)

Please forward a copy of this letter to _____, their private counsel, and to the carrier. I await your response.

Sincerely, etc.

How did the defense attorney respond? He didn't. Instead, my buddy soon got the following email from one of his partners.

Mr. Joyce,

The Johns ER has confirmed that Mr. Defense Attorney has been admitted [to the hospital], but he currently still remains in the ER and the ER does not have room numbers.

They are waiting for a room to become available on the floor of the hospital and I will let you know when that happens.

Mr. Joyce,

Mr. Defense Attorney has now been admitted to the hospital floor and will remain admitted at least through tomorrow. I will continue to monitor his status and let you know.

Per our prior telephone conference this morning, it is my understanding that now that Mr. Defense Attorney has been admitted you will agree to cancellation of the hearing tomorrow and the deposition of Dr. _____ tomorrow.

Then my friend Bob went one step further. He sent another letter to the defense attorney's boss.

Dear _____:

As you know, we have a mediation coming up next week. I am not sure if you are aware that I sent a demand letter to Mr. Defense Attorney on this case. Inasmuch as he has had some medical issues, I am sharing it with you. I suspect that you will want to share it with the principals of your law firm. As you can plainly see, I require an affidavit from _____ regarding the insurance coverage.

Once again, please share this with the partners in your firm, because I doubt that they are aware of the situation.

Finally, you may wish to see if the letter was passed on to _____ and the Insurance Carrier so as to avoid further potential liability for your firm. (I have the green card by certified mail that it was received by _____.)

After the demand letter went out, the case settled.

Later, I received a letter from Bob advising me about his conversation with the new defense attorney. Not only did the Reptilian letter work in settling the case, but the defense removed the obstructionist defense counsel so the case could be settled.

Bob wrote, "We were discussing how she saved the firm's bacon by settling the case, and she said *we are all about self-survival.*"

Sounds like the Reptile, does it not?



DON KEENAN

CHAPTER FOURTEEN

Reptile and the Treating Physician

Let's face it, the treating physician is someone we have to deal with whether we like it or not. Sometimes it can be a great relationship and other times the height of adversity. We can be the bug or the windshield.

Let us first examine some Major Truths in this relationship:

MAJOR TRUTH #1: LAWYERS ARE FROM MARS, DOCTORS ARE FROM VENUS

Doctors are taught to be optimistic – to always look for the best outcome. Their Reptile tells them that they cannot admit a bad outcome, so in trial they will go overboard explaining how great their treatment was and how wonderful the outcome was. We lawyers tend to present to the jury the worst case scenario, which does not reflect doctors' rosy opinions.

With a younger doctor you have a shot at explaining this difference, so he understands that his words will seal the future of the client/patient, and that if he's wrong then the only one to suffer will be the client/patient. The older white coats can have too much ego to admit that their treatment didn't cure.

MAJOR TRUTH #2: DOCTORS HATE LAWYERS

We speak different languages. Doctors view us as making money off of our client's misery at best, and at worst lurking in the bushes to sue doctors for whatever happens. This can be muted by overly praising the doctor for his wonderful treatment, the great trust the patient/client has in him, etc.

Now let's get to 10 simple rules which should govern your dealings with the treating doctor:

Rule #1: Fire them early and quick if they're sending your case over the cliff. If you get the gut feeling that the doctor is going to gut your case, get the patient to another doctor. There are many ways to keep your fingerprints off of this transfer. But even if it

does comes out that you've had a hand in getting the patient to a more favorable doctor, it's worth it so that you can keep your case from being gutted.

Make sure the new doctor is personable and cooperative, so the jury will like him. The thought that you had anything to do with connecting the client will evaporate.

Obviously if the client already has other doctors and they are favorable, get that original doc to make the referral.

Rule #2: Know the power of the doctor's staff. Make it a point to be personable and kind to the doctor's staff. Remember them. Get to know their anniversaries, their likes and dislikes, and who they are as a person. Read and follow Dale Carnegie's *How to Make Friends and Influence People*. It works.

Don't underestimate the chatter and buzz the staff will give the doctor about this one lawyer who is different than most, who cares for the patient, who is very involved, etc.

Rule #3: Don't you be the spokesperson for your case. Because of our dog/cat relationship with doctors, I always have a nurse do the doctor conference and go over the treatment and the disability ratings. Everything is best done by anybody but a lawyer. (The exception, obviously, is when you have a good relationship with the doctor or when you can come across completely off-Code so that you're the opposite of what the doctor expected in the lawyer.⁷⁹)

There's another huge advantage to having someone other than you talk to the doctor. It gives you a witness if the doctor goes south from what he said in the conference. If the doctor on deposition or at trial suddenly disavows everything he said in the office, then what do you think your chances are in a swearing contest between you and the doctor? That dog won't hunt. So when a treater has gone south I put the interviewing nurse on the stand to contradict him. That dog hunts! It has resulted in some verdicts larger than if the doctor had simply told the truth. When the doctor is credibly contradicted, the jury will believe the Black Hats caused the change. Many people still believe there was a second shooter on the grassy knoll in Dallas. America loves conspiracies. Bubba will connect the dots and put the Black Hat in the bucket.

Rule #4: Always pay the doctor promptly. Doctors rant for hours about lawyers who bounce checks or stiff them on their consulting fees, etc. Tell the doctor how despicable it is when lawyers don't pay – and offer to do anything and everything to help the doctor collect old fees. I don't know how many phone calls I've made on behalf of doctors to get lawyers to pay up. Doesn't matter if I collect it; it's the fact that I tried, which is enough for the doctor.

79 "Code": See *Reptile*, chapter seven.

Rule #5: Make your client the conduit between you and the doctor. Prime your client to tell the doctor how very important the lawsuit outcome is to the quality of her life and how very important it is that the doctor cooperates with the lawyer, even though she knows doctors don't like lawyers. We've role-played with our clients – and I strongly suggest you do – to get them ready for this. We also have the clients write a nice note to the doctor thanking them in advance for cooperating with the lawyer.

Rule #6: Get a doctor friend to open the door. Understanding our cat/dog relationship with doctors, have one of your friendly doctors call the hostile doctor and give him the bottom line on you: Good lawyer, cares about the client, will protect the doctor, won't arm twist, etc.

Rule #7: Protect the liens. Obviously, yield to your state ethics rules – but there's no better way to make a friend of a treating doctor than to agree to protect their liens.

Rule #8: Help the doctor. Start your conversation with the doctor by talking about what kind of patients he's looking for; ask how to refer your other clients to him; ask about the doctor's various specialties you might require in future cases, etc. A doctor who knows that you might send more work will not easily bite the hand that feeds him.

Rule #9: Recreate with doctors. Years ago I attended a weekly poker game with eight doctors, no lawyers. It's amazing how much bonding occurs at 1 a.m. with booze and stogies.

Then, from time to time I asked my card-playing docs to make the intro call (#6 above) to the treater; it always resulted in a favorable reception.

Rule #10: At all times, be off-Code. Actions speak louder than words. If you are prominently recognized in the community for doing good deeds, expect a better reception from the treater. You probably have seen my monthly "Giving Back" column in your state trial lawyer magazines, where each month I provide easy-to-implement "Give Back" projects in your community. But understand that at all times you have to be *authentic*. If your motive is just to pander to doctors and the public, it will backfire. But if you are motivated by the genuine desire to give back and help the community, good things will follow.

BOTTOM LINE

All this might seem to be a lot of work. Even if it is, it's worth it when the treater testifies in deposition or in trial and hits the ball out of the park on your behalf. This happens only when you've done a lot of work in advance.



JOEY McCUTCHEN

Joey McCutchen, the founding member of McCutchen & Sexton – The Law Firm, has been an Arkansas trial lawyer since 1988. Joey believes that “if trial lawyers do not fight the battles in the public and legislative arenas, then there will be no battles to fight in the court room.” He actively participates as a member of numerous community organizations including the Morgan Nick Foundation and Fort Smith Boys & Girls Club. He founded Arkansas Consumer Advocates, an organization dedicated to protecting consumer rights, promoting community safety, and educating consumers about the Seventh Amendment right to trial by jury. His “safety rules” motto is evident in numerous community functions, such as replacing hundreds of unsafe child safety seats by facilitating annual child safety seat inspections. He also sponsors “Ride 4 Their Lives”, a cycling event empowering thousands of children with knowledge about safety and “Take 25” safety presentations to area schools and Boys & Girls Clubs, an event sponsored by the National Missing and Exploited Children Foundation. Joey has received numerous awards, most recently the 2013 Arkansas Trial Lawyers Association “Citizen Merit Award” for his courage and determination to promote accountability and justice in the fight against tort reform. In 2007, he co-founded NextLevel Sports Management. When not trying cases, Joey is busy negotiating contracts and providing other services for college coaches and athletic directors. Joey and his wife, Tara, have two daughters, Elizabeth and Victoria.

CHAPTER FIFTEEN

Mechanism of Injury Fact Witnesses Risk Factors

THE PUBLIC FIGHT

If we don't fight in the public arena and in the legislatures, there won't be any battles for us to fight in the courtroom. Big business and big insurance are out to crush us.

I wear a "seven" pin – a seven with an explanation point. You can wear the golden gavel and everyone knows it means you're a lawyer, so no one asks what it means. But when you wear the seven, people ask about it. I had a state legislator come up to me; he's a tort reformer, and he asked me, "What's that seven stand for, Joey?" I told him it stands for lucky seven. "What do you mean by that?"

Well, it stands for the Seventh Amendment.

When you say that you get that look – people don't quite know what the Seventh Amendment is. So I said, "You know what the Seventh Amendment is?" He said, "I'm not so good at the Amendments."

I said, "But I bet you know what the First and Second are, and I bet you won't give up on those." The legislator turns to a young lawyer with me and asks, "What is the Seventh Amendment?" The young lawyer explains the Seventh Amendment and its battle with tort reform. That's the teaching we have to do. I have a website, www.whataboutseven.com. Come look at it.

Even more important than teaching, we've got to change our image. Mainly we can do this by doing things for the community that don't simultaneously benefit ourselves. We all have to show by what we do that we're "off-Code," off the bad stereotype.⁸⁰

Now let me turn to cases – but remember, unless we educate and re-image, pretty soon there won't be any cases.

WITNESSES

Which cases are we going to take to trial? For me, foremost is to have a credible plaintiff, because generally we're relying on the client's word. So I need lay witnesses that include

80 See Chapter 7, *Reptile*.

family, friends, neighbors, co-workers and others who have been around the client and can talk about his character. Find folks who are like you and me – good folks, workers. People with good character. Good qualities. Dependable. Witnesses who can tell little stories illustrating your client’s qualities, little stories about your client before and after: How the client used to go shopping, a little story about how she used to take us to the mall almost every weekend, now she can’t. I want little stories that show us the injuries – instead of generalizations like, “Oh, she used to have energy and now she’s tired all the time.” We want little stories from lay witnesses that show us both.

These witnesses must include people outside the family. This is because jurors often think that family members have a stake in the outcome, and are therefore less credible.

MECHANISM OF INJURY

We do digital motion X-ray (DMX). It’s a digital-quality X-ray in motion. The client moves her neck through different ranges of motion. In most cases, the DMX shows that the bones, the neck vertebrae, are “loose” – they move farther than they should. We measure that movement. AMA Guides says if they move much it’s abnormal. So we have no “junk science” problem.

The movement happens because the impact has damaged ligaments that normally keep the bones from moving too far.

When a ligament is torn, there’s even more movement of the neck bones. For example, if you have a torn posterior longitudinal ligament (don’t use that – or any other – medical term with jurors), it allows neck bones to move too far front to back. A proton-density MRI can evaluate the level of ligament damage. More often than not, ligaments are torn and the radiologist can grade the tear: Grade 1, 2, or 3. A Grade 3 tear is traumatic.

So now your case is about torn ligament structures and their consequences. A good exhibit showing all the various tears is powerful.

I also use Silly Putty⁸¹: I stretch it to show the jury that it breaks; it does not bounce back like a rubber band. And once a ligament is damaged, it’s like Silly Putty. It stays torn. It’s permanent.

There are two ways doctors can treat this: They can drill holes in somebody’s head and implant stabilizing bars, or they can apply conservative treatment such as epidural steroid injections.

Arkansas attorney Don Chaney fought a defense Daubert motion that claimed that this is all junk science, hocus pocus, and has been around only a few years. But doctors have been using it for 50 years. It’s simply a digital X-ray with the body in motion. The defense can still try to argue about whether the bones are really moving as much as your doctor says, and that maybe the bones were moving that much before the wreck. It’s a lot easier to win those battles once you’ve shown the mechanism of injury.

81 Silly Putty is found in toy stores, not hardware stores.

I show a video from Dr. Art Croft: *Man Versus Machine*. It shows the effects of hundreds of crash tests on the body, including the rapidity of the velocity change on the neck. This shows the force on the neck and head in low-speed collisions.⁸²

RISK FACTORS

Always look for the risk factors that were present for acute injury in a low-speed rear-impact collision. For example, did this person have an earlier neck injury?⁸³

We use pre-existing conditions as a sword, not a shield. For too long trial lawyers have run from pre-existing conditions. That's a huge mistake. And it can be a great sword, because the defense doctors give us the best evidence for it. They focus on pre-existing condition. And every state has the jury instruction that the defendant takes the plaintiff as they find them. I use the farmer's eggs analogy: If you rear-end a farm truck full of eggs and you break the eggs you're going to pay for them, even though if he'd been carrying golf balls they would not have been broken.

There are varying degrees of pre-existing injury or disease. If your client has neck pain of eight the day before the wreck despite steroid injections and physical therapy, and neck pain of nine the day after, that's a tough case. You need a greater before and after difference. You often have it, because pre-existing conditions are usually silent, no pain. Post-crash there's pain.

Some jurors will say, "I was in a low-speed crash and I didn't get hurt, so how could this guy be hurt?" Our answer is that the pre-existing conditions made him more susceptible to being hurt, so he was like the eggs, not the golf balls. In closing, I set a carton of eggs down hard on the table. I'll say, "Now, do you see any damage to this carton?" They see none. "But would any of you buy the eggs inside?" Of course the eggs inside are broken, so it's a good analogy.

Another risk factor is head-restraint position; too low, too far from back of head, etc. If too low, for example, the head snaps back over the head restraint and then whips forward.

Other risk factors include seatbelt type and configuration, increased age, and non-awareness of impending impact: Did the plaintiff know she was about to be rear ended? The answer is almost always, "No." She was caught off guard and had no notice or time to brace.

Risk factors provide beautiful cross-examination of the defense expert, their bio-mechanical guy or their medical examiner. They say she could not have been hurt. So

82 **Ball note:** When the defense says low speeds can't cause this level of injury, they open the door to your showing how commonly these "low-speed" crashes injure drivers, passengers, kids in safety seats, and that it happens in cars, school buses, etc. This effectively spreads of the tentacles of danger. You can get these numbers into evidence via a high-school driver's ed teacher.

83 See Chapter Two above on "Judo Law."

ask them questions they don't know how to answer. First, through your chiropractor, you show the risk factors for injury, about 10 of them. Then ask the defense expert:

Did Mary know she was about to be hit?

At impact, did she have her head turned?

Was she out of position?

What position was she in?

But you know about her earlier neck condition, they gave you that information, didn't they?⁸⁴

Doctors are supposed to be heroes and they're supposed to care.⁸⁵ When the defense doctor didn't care enough to have learned about the risk factors that affect the life of this patient, he is dangerous as both a doctor and a witness.

Juries want to know that our client was doing her job. So if she had her head turned, looking to the right to make sure that traffic wasn't coming (or whatever the case may be), that is important.

Using risk factors, we try to turn every fact into something that helps our case.

AFTER THE CRASH

As David's *Damages 3* teaches, always look at what the defendant did after the crash. Did he call 911? No. Go over to the car, check on him? No. Your client was lying on the pavement and the defendant never tries to help? Those things can make a case. It shows the defendant didn't care.

STIPULATED LIABILITY

Often the defense does not admit liability until just before trial. This long-term denial adds to your client's stress. I use it in cross-examination to build damages:

"Doctor, don't lawsuits cause stress and anxiety?" and, "Doesn't it cause stress and anxiety when you know someone hurts you and they deny it they did it?" and, "When people have stress and anxiety it can make their pain feel worse?" and, "Doctor, would you think if this lady was forced to file this lawsuit, it would increase her pain level?"

I also file a motion *in limine* saying they've now admitted liability and we have testimony from a medical doctor that the long delay and having to sue goes to her damages – so we should be able talk about this last-minute stipulation of liability.⁸⁶

84 **Ball note:** You should also use risk factors (such as body position) to show why others in the car were not hurt.

85 See *Reptile*, Chapter 7 on Codes.

86 **Ball note:** Even just your client's (and/or her doctor's) statement that it added stress should allow you to make this argument.

TRUST AND BETRAYAL

Questions for your client:

When you were driving, did you trust other drivers to follow safety rules?

Tell us about that.

Did you expect the defendant driver would follow the safety rule to look where she's going and see what's there is to be seen?

Because of this trust did you make yourself vulnerable to him?

Did you rely on him to see what there was to be seen?

Tell us about that.

How do you feel about the defendant violating the safety rules to see what there is to be seen?

Tell us why you felt betrayed.

Gerry Spence says, "Trust and betrayal are in every case. You just have to find them."

FINAL POINT

The Reptile is a culture. It's a fun culture. Everyone in our office participates. It starts with case selection and goes all the way through the trial. When you do that well, tort "reform" in the courtroom is dead. R.I.P.



DANITA GLENN

*Danita Glenn has a passion for helping people in need. The Reptile has given her the opportunity to exceed maximum settlement values on cases that are typically thought of as "little." Danita's passion for people is the foundation for her practice of personal injury law at The Hart Law Firm. Danita received her B.A. in Business Administration at Grand Canyon University in Phoenix, Arizona. She went on to study law at Texas Wesleyan School of Law in Fort Worth, Texas, while serving her community as a pro bono student attorney and tutor. **Reptile Superstar July 2011. Speaker at the Reptile in MIST seminar.***

CHAPTER SIXTEEN

In The Beginning

By the time of my first trial, I had been practicing for just over a year. I had nothing to go by except for what Don and David had put out, so I followed everything. I had 30 pages of notes just from the introductory Reptile seminar and I applied that knowledge everywhere in the case. It worked. So I continue to use the Reptile principles in all our cases going forward.

In my first trial, the client had under \$2,000 in medicals. All soft-tissue injury. The client had gone to the chiropractor eight times in one month, then stopped. No more treatment. The verdict was \$54,000.

To the jury, your case is what it spends its time being about. So you need to make sure it spends its time on the Reptile: Community safety, tentacles, harms and the losses – all of it.

Your case development begins when your client first walks in your door. That's when you get a first impression of them and them of you. You have to understand right from the beginning where the client is coming from, or you won't ever get a full sense of her. From day one you need to spend time with her. You need to do this with every case because you have to treat every case as if it's going to trial. So don't take a case unless you're willing and able to take it to trial. You never want to have to tell a client that you can't continue on the case because the insurance company won't pay enough. It breaks their hearts and their life has already been interrupted enough. Dropping the client will damage them even more, and you have no right to do that. They came to you for help, not more harm. And dropping them does your professional reputation no good. So unless you're sure you're willing to go to trial, don't take the case.

I start working with my clients to help me with the Reptile from the day they come in the door. I ask them about the defendant's actions and what rules the defendant violated. When I begin the introductory prepping, it's amazing how much Reptilian stuff they give me, and they continue to do so as their case evolves. So bring the client on board with the Reptile. After all, there are Reptilian specifics of the case that only your client knows intimately well.

When it comes to client prep, you have to do it yourself – not an associate, not your paralegal. Do it yourself or you won't find out what the client's really going through. A second-hand report from an assistant is not enough. If you're not intimately familiar with it yourself, you won't have the necessary passion in trial, or the real sense of what the client went through and her reactions to it. You won't feel what she feels, so you won't be able to convey it to the jury. You cannot get what you need by proxy.

Some lawyers talk to their clients only once or twice. That's never enough. There's no Reptile in just the basic story. What has happened has been a tremendous interruption in your client's life, and that's the part of the story that contains a lot of Reptilian material. You'll never get it all in just a meeting or two. You need to spend time with your client to be able to show a jury the depth of what happened to her. And you need to get your client ready to testify the way the Reptile DVD teaches.⁸⁷

DEPO OR TRIAL TESTIMONY PREP

The Reptile client preparation DVD says you need three days for preparation. That doesn't mean three *full* days, which you obviously can't always do, and you don't need to. But you do want to spread the preparation work out over three days, covering a couple of hours each day.

Fear of humiliation → Stress.⁸⁸ Almost every witness's greatest fear is being humiliated while testifying in deposition or at trial. This is a huge Reptilian fear. Defense lawyers try to leverage it because they know that your client will say almost anything to avoid being humiliated. So your client can end up saying, "Yes, yes, it was my fault." Or, "Yes, I was speeding," or whatever the client needs to say to get out of the humiliating situation as fast as possible. The right kind of witness prep leaves your client knowing that she *cannot* be humiliated during testimony. That deprives the defense of one of their most important tools.

The know-it-all client. The hardest client for me is the "experienced" know-it-all. She's been through deposition or trial before. She thinks she has it all down and needs no preparation. So how do you get her to want to participate in the preparation process?⁸⁹ As Don suggests, explain that it's as much for you as it is for her, so you can learn all you need for trial.

87 See DVD – *Reptile: Keenan Method to Witness Preparation*, available at ReptileKeenanBall.com. Also see *Keenan Edge* p. 129.

88 **Ball note:** The more your client remains worried or scared about testifying, the more he'll be warm putty in the hands of the defense.

89 **Ball note:** It also helps to call the process something other than "client preparation." Call it instead an "attorney-client process" aimed at making the two of you a good team.

Fears and concerns. During the first day of the client's prep (remember, you need just a couple of hours each day), I go over the client's fears and concerns. I don't tell the client a bunch of things to do or not do, which would only raise her stress level and make her so scared that she's bound to blow it when she testifies. So as the DVD teaches, we ask the client to bring in a list of fears and concerns about testifying. We want things to come from the client, not us.

Sometimes clients say, "I have no fears, I'm not at all concerned about testifying." Don't believe it. They're almost always wrong. They'll say, "It's no big deal, it's just a trial." It's not until you actually start sitting and meeting with her – and listening to her, not barking instructions at her – that you'll see, whether she knows it or not, that she has plenty of fears and concerns. Everyone does. And they all fear humiliation. So if you don't find and take care of her fears and concerns in advance, you give the defense attorney the last tool you want him to have.

When prepping a client, it's hard to sit quietly and listen rather than jumping in at every opportunity to give advice and admonitions. But jumping in is the worst thing you can do.

During client prep, when you don't listen, you talk. When you talk, you are pressuring your client whether or not you mean to.⁹⁰ And the more you talk, the more words you put into her mouth. She won't speak your words well in testimony, because they're not hers. And putting words into your client's mouth multiples all her fears and concerns.

What do I mean by fears and concerns? Well, some clients might worry about their looks. Or that they'll forget the right answers – such as dates or other details. Or that they'll say something by mistake, or not be clever enough to deal with a defense attorney trying to undermine them.

So as they bring up their concerns, don't jump in with solutions (though you will really want to).

Control yourself. Make no judgments. Get the client to talk more and more about her fears or concerns: "Tell me more about that." And then, "Tell me more about *that*." You want to let her vent completely on whatever concerns her.

Most importantly: Respect her concerns. Don't make light of them just because you think they're not important. It's too easy to say, "Oh, don't worry about that, you'll do fine . . ." and then never deal with it. For example, if your client is worried that the defense attorney will put words in her mouth, it does no good for you to say she

90 **Ball note:** "Don't worry, just do what I tell you" raises, not lowers, stress, and virtually guarantees they won't be able to do what you want them to. This is because now, in addition to your client being scared of what the defense will do to him, he's also afraid of screwing up what you told him to do. And you cannot successfully tell anyone to stop being worried or scared. In fact, the more you say it, the more worried and scared they get. And the worst thing you can say is the all-too-common (and terrifying) warning that "*If you don't do what I just said, you will lose the case for us.*" Say that only when you want to lose the case.

doesn't need to worry about it. If you say, "Oh, don't worry, I get to come back and get it straight," it does little to relieve her of the fear that she'll say the wrong thing. She'll just end up contending with her old adversary, that gift to the defense, the Reptilian fear of humiliation. To escape humiliation and get out of the situation as fast as possible, she'll likely to end up agreeing with everything the defense tries to get her to agree to. Her Reptilian drive to escape the moment of humiliation trumps everything else, including her desire for a good verdict. She won't even be thinking about the verdict.

Clients often worry about remembering correct dates. So tell her she can bring notes. Remind the client that the defense can ask to look at the notes, so she's not to write anything on it like, "The defense lawyer is a big jerk."⁹¹

MAJOR TRUTHS

As you'll see on the Reptile client prep DVD, we next go into the client's "Major Truths." And we do a guilt check. Whenever somebody's been injured or a loved one has been killed, your client thinks deep inside that she should have done something to avoid it. In other words, she blames herself. "It was my fault because I probably slowed down too much," or, "Even though the light was green, I still should have looked both ways." This is dangerous because the defense knows to dig for it and exploit it. And the client will have a hard time disagreeing. "You could have looked both ways?" and the client responds, "Yes, yes I could have." The DVD shows you how to find that guilt and get rid of it.⁹²

What are "major truths?" They are the things the client absolutely knows to be true and unquestionable. Again, the DVD shows how to find and use the major truths. They are the Rocks of Gibraltar to which your client will constantly return throughout her testimony, so that she (and you) will never worry about saying the wrong thing or being misinterpreted or humiliated. So when the defense lawyer says, "You were speeding, weren't you?" your client knows she never speeds, that the defense lawyer may want to make it seem like she was speeding, but, "No. I am always afraid of getting a ticket and we can't afford it, so I never speed," and that's the end of it. That major truth is always the same. It is always the answer, no matter how or how many times the defense attorney tries to get her to admit to speeding. They result in answers that are not only the truth, but are firm, provide no wiggle room, no backing away – not a shred of uncertainty. It leaves no chink in the armor for the defense attorney to find and exploit.

Through the DVD's method of client prep, your client will see – without you lecturing her or even telling her – the strength of her understanding that the defense attorney wasn't at the wreck, and isn't privy to the injuries. Your client will come to understand,

91 **Ball note:** Tell your client that the defense lawyer has tons of notes, boxes of them, as do you, so nothing's wrong with your client having some too.

92 **Ball note:** Removing that guilt can be the most important thing you do for your client, even more than getting a proper dollar verdict. Festering guilt can eat away at a person for decades.

and will be secure in her belief, the real truths, the “major truth” about what happened and what the injuries are. When the client gets this on her own (as she will with this method of preparation) she has security and peace that it’s her true, unshakable story. She’s the only one who can tell it for real. That makes her the kind of witness the defense can’t touch.

As you continue the prep over three days, your client’s major truths will get easier and easier for her to say and be sure of. She’ll use them over and over with confidence that the defense cannot dislodge. She’ll be confident in saying the wreck was not her fault, that she had no pain before the wreck, and whatever else the defense tries to dislodge. By the time prep is done, you’ll have a bullet-proof, guilt-free client who will help you win. This kind of client prep is one of the most important skills you can learn.

You should also prepare your other witnesses for trial. Chat with them two or three times. Otherwise you’re gambling. A witness naively saying something unexpected can kill the case. In fact, if you spend time with every witness, you’ll discover that there are some you should not call. Better to know before than after.

Fact witnesses are particularly important. They often know things – especially about the harms and losses – that your client has never told you. For example, your client might never have realized that her migraines are a result of the wreck, so she never mentioned it to you or her doctor. We had a client whose migraines quadrupled after the wreck but she never connected it to the wreck. Fortunately, her family knew. We’d never have found out if we hadn’t spent a couple of sessions with the fact witnesses.⁹³

FAMILY

One major Reptilian damage theme centers on family – even something as simple as, say, the family’s dream of going to Disney World. We had a client who went to Disney World with her 13-year-old daughter. They got a five-day hopper pass. But because of mom’s pain from the wreck, she had to abandon the plan; they had to go home. She had to tell her daughter, “I can’t continue, it just hurts too much.” If that doesn’t resound in the jury, I don’t know what will – because every family has their own version of the Disney World dream.⁹⁴ And it resonates.

FACT WITNESSES

Fact witnesses can help spread the tentacles of danger. Ask, “What else could have happened in this wreck?” It’s amazing what they’ll come up with. For example, “Well, if

93 **Ball note:** Your fact witnesses are your best source of how the injuries have affected your client. You want a good number of them – five or six, even nine or ten. Each for just a few minutes, each saying something different, and all of whom provide vignettes illustrating your client’s harm. That’s far better than just your client describing her injuries and thus seeming like a whiner. See Section 6-9 of *Damages* 3.

94 **Ball note:** You might want to ask in jury voir dire what they are.

my granddaughter hadn't been dropped off at daycare just a few minutes earlier, she could've died because the seat was crushed." You'll find gems like that only if you talk in advance with these fact witnesses.

Your fact witnesses – including your client – can help spread the tentacles of danger by testifying about the nature of the community near the wreck: Pedestrian traffic in the area? School kids going home? Daycare centers? Businesses? "Oh yeah, kids cross at that intersection all the time," or kids on bikes, a family restaurant, etc. When you discuss this kind of thing in your fact-witness prep sessions, they'll go home and think about it, and then give you a whole lot more in trial.

Your fact witnesses can talk about the harm to your client. **Life witnesses** are those who knew your client before the wreck and after. Work with them to get their view of the life before, versus the life after. You want witnesses to say, "Yeah, I saw the change, here's what she was like before and after."⁹⁵ These witnesses must have no stake in the lawsuit's outcome.

When you do all these things to establish your harms and losses, jurors stop seeing the case as "small."

PICTURES

We take our own crash-site pictures. We don't use a professional photographer. To spread the tentacles of danger we make sure our photos have pedestrians, the community, shops or schools, etc., in the backgrounds. A photo with a woman and her kids in the background at the busy intersection is more effective than just saying there are people there. As the saying goes, a picture is worth a thousand words – maybe two thousand with a good background.

CLOSING

Arm the jurors with everything they'll need to go into deliberations and win for you. "My client followed the safety rules, he didn't break them, he went for treatment as quickly as possible." Give all the necessary answers for jurors to respond to arguments that defense jurors might make.⁹⁶

In closing, I'll also say this may seem like a small injury, but not to the person it happened to. And the harms and losses don't stop at the property damage. Some jurors

95 **Ball note:** They don't all have to be able to speak about both before and after. Some can speak just about one or the other, as long as you end up with an overall picture of both, from multiple witnesses. But do try to have two or three who saw the change from before to after. And use all those fact witnesses to give illustrative vignettes, not just abstractions. Saying, "Now she's fatigued all the time" is ineffective. We need little stories that illustrate times when she was so fatigued she couldn't do what she wanted to do. See section 6-9 in *Damages* 3.

96 **Ball note:** To learn to arm jurors, see section 8-4 of *David Ball on Damages*, edition three.

think, well, you have a crumpled car, you uncrumple the car, everything's OK again. You want jurors to focus on the fact that the hurt goes beyond the car's dents, and continues day after day, year after year.

And remember your Reptilian triggers in your closing.

CASE INTAKE

We look carefully at whether it's a case we can apply the Reptile to. If there's not a rule violation, then we don't want the case because jurors will see it as just an accident.⁹⁷

COSTS

I am frugal, even to the point of using coupons at office supply stores to save on blowing up our exhibits. If something on Westlaw is outside our plan, I try Google first to see if I can find it there. Little things add up quickly and can make the difference between whether or not it's prudent to take a case.

We also cultivate good relationships with businesses – court reporters, videographers, process servers – and promise them all our business in return for discounts, say a \$20, \$25 discount every time. Again, that adds up fast. Even when a case can afford to spend more, spending less will result in more money for our clients. What seems to you like a small amount can be significant for your client.

SHOWING INJURY AT LOW IMPACT

Bring in a chiropractor or doctor to explain just how injury can occur even with little damage to the vehicle. Once the jury understands it, it's amazing how well they see how such a little impact can cause such a big problem. For example, when a chiropractor stretches a trash bag to show what's happened to a shoulder ligament, the jurors get the fact that it stretches and can never return to its original length.

Also, we move *in limine* to keep the defense attorney from saying – with no expert – that people can't get hurt in a 10 mph wreck. It's not true, it's not scientific. This should be a motion at every such trial.

PREPONDERANCE⁹⁸

Preponderance questions are a great way to get rid of bad prospective jurors. In our last trial, we busted the panel because so many prospective jurors could not follow the law. We had to bring in another panel. So pay particular attention to the burden of proof

97 **Ball note:** If you track the “accidental” act backwards in time, you'll almost always find a rule violation. Hitting your client's car might have been an accident but not watching the road was a rule violation.

98 **Ball note:** Don't handle preponderance the usual way. Done properly, you'll get many cause dismissals and your jurors will actually apply preponderance and force each other to. See *Damages 3*, Chapter 3.

throughout trial. In mock trials, it's amazing to hear so many jurors saying, "Oh, yeah, well, I don't think they proved it beyond a reasonable doubt."

JURY SELECTION

We try to spot people who say that highway safety is in their own hands, not the other drivers'. Jurors who say, "I'm going to make it home safe no matter what, because I'm a defensive driver" are not good for us. We want jurors who say, "I can't control what everybody else is going to do on the road."⁹⁹

⁹⁹ **Ball note:** Ask, "Some folks feel they're at the mercy of other drivers; other folks feel they drive well enough to take care of themselves. Which way do you lean?"



CHRIS RODD

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CHAPTER SEVENTEEN

A Brief Idea the Reptile Loves: Fact Witnesses

Look for fact witnesses. You want a number of them. Ten minutes each. “What did she do at work?” One co-worker said, “Well she couldn’t do the grill any more, I had to do it for her.” And “What’s she like now?” So you’re not just asking the jury to believe you or your client – but all those witnesses.

I also put the policeman on the stand, and ask him why they enforce certain laws. “Why do you enforce the seatbelt law?” Or, “Why do you enforce the stop sign law?” And he can tell you: “Well, if you run the red light people get hurt.” “And you’ve worked those wrecks?” “Yes sir.” “What have you seen?”

This all shows why the rule is important. “Do people break that rule on a regular basis?” and “How many tickets have you written for that rule in your career?”

Spend time in advance with your witnesses. Have your client bring them in. Sit down in the early evening, not when it’s really busy at your office. Or go to their house and hang out one evening. You learn a lot that way.

I always say this: “Create a word picture with your witnesses. If you were blind and you couldn’t see the ocean and you had 10 people come and describe the ocean to you, you would want them to describe every detail so you could see it in your mind.”

That’s the way you want them to talk about your client before and after. Little stories. Visuals.



ALVIN WOLFF

*Alvin Wolff Jr. of the Law Offices of Alvin Wolff Jr. and Associates has a proven track record of results in plaintiff's personal injury and medical malpractice for over 34 years. He has been included in multiple editions of The Best Lawyers in America and Super Lawyers. He has served as an Adjunct Professor of Trial Law at St. Louis University Law School. Alvin has developed a class for plaintiff's lawyers using spin bikes and classwork in a series of seminars called "Spin Your Strategy" which focuses on the Teachings of Keenan and Ball as well as Friedman and Malone and the late great Moe Levine. Lastly, Alvin donates his skills and resources to numerous charities and civic minded groups. **Speaker at the Reptile in MIST seminar.***

CHAPTER EIGHTEEN

A Reptilian Mediation

Who's ever gotten more than \$500,000 on a dog bite case? For this one, I left mediation with a \$75,000 offer. We got 26 strikes for cause in jury selection – and ended up getting resolved for \$900,000.¹⁰⁰

This chapter is about our mediation presentation. A lot of it is like opening statement. I start with a general tutorial, because I want the insurance company to know that we know the law. And I don't know what the defense attorneys have told the insurance company. This is the only time I'll see the insurance people, so I target them with this mediation summary. I don't care what the defense lawyer has done. The defense lawyer at mediation is not likely the first-line guy on the case, and probably doesn't know much about it himself.¹⁰¹ So we start with a slide-show tutorial.

"If a homeowner who knows her dog is dangerous does not to warn visitors, then if the dog hurts a visitor, the homeowner is responsible for the harm."

It's non-argumentative. It states the law. And for a bodyguard, my slide shows the case law behind it.

Next we present the general definition of negligence; I don't need to repeat that here.¹⁰²

100 **Ball note:** See *David Ball on Damages* 3, Chapter Three, for the best way to get cause dismissals.

101 **Ball note:** See *Reptile*, Chapter Sixteen. A major Reptilian requirement of mediation is to *insist on having a defense decision-maker in the room*. No phones calls, no emails to see if someone back at their home office will approve of any particular figure. Don't back down on this (or any other pre-arranged condition of your showing up at mediation) unless you're hungry enough to settle low instead of trying your case, and unless you want to weaken your hand for upcoming mediations in other cases. If the defense sees you're a creampuff they'll know they never again have a reason to take you seriously.

102 **Ball note:** And add, "There's no such thing as reasonable care that needlessly endangers anyone." Reasonable care does not mean average care, and you want to be sure the insurance people know it. In addition, this is the formulation that best gets to the Reptile. See p. 63 in *Reptile*, and 232- 233 in *Damages* 3.

Then we talk about the homeowner. (We use the surname, but in this chapter I call her “the homeowner.”)

What did the homeowner do? Knowing her dog had earlier bitten three people, and having been told that the dog would bite again, she negligently 1) chose not to warn Antoinette that their dog had bitten three people, and 2) chose not to confine the dog. And as a direct result, the dog seriously injured Antoinette. So the homeowner is at fault.

That’s a little argumentative, but I match it to the jury instruction. And it frames the rules in such a way that the defense has to agree.

Now I get specific, back-chaining the events. I take it back to when the homeowner started to learn things about the dog. What did she know; when did she learn it?

The bite was in 2009. I show that back in 2006, a vet record dated 12/27 said, “Owner reports bit her and this weekend bit grandson, broke skin, [I] warned owner of legal problems and that would bite again. Also bit grandson’s sister.”

We have Dr. Schusler as the bodyguard of this record.

My next slides deal with Dr. Schusler’s videotaped deposition. I use cartoon bubbles to show the questions and answers.

Was it the homeowner that told you the dog bit her?

Yes.

And the homeowner told you that during the weekend, the dog bit her grandson and broke the skin?

Yes.

And the homeowner told you the dog bit her grandson’s sister?

Yes.

And then big questions:

What did you tell the homeowner about her dog?

Well, I did warn her of legal problems.

And as best as you recall, can you tell us what you told her?

With someone in that situation where their dog has bitten someone, I warn them that if their dog bites again, they’re likely to be held liable for that.¹⁰³

Next, I move on to what the homeowner says about the dog having bitten people. I show the depo slide with bubbles.

103 **Ball note:** You can spread the Reptilian tentacles of danger (see *Reptile* pp. 58-62) here by asking about the worst kinds of injury this kind of dog can inflict, and to whom: children, adults, the elderly, other pets, passersby, etc.

Did he ever bite your grandson?

I don't call it a bite. I call it a nip. He did nip Andrew.

That shows there's no repentance. And everyone knows what a nip is. It's a bite you don't want to admit.

What else does the homeowner say about her dog biting people?

Did the vet ever warn you about potential legal problems?

Well, he thought the dog had bitten four people, and he misinterpreted me, and the dog didn't bite four.

And she names the four people who were bitten. Well, the vet's record only reflects three people, so I got a bonus. Now I've got four bites.

Next comes what happened in this case.

The evidence showed that my client was going up the steps. She called the dog to come with her. She tripped on the dog. She was on top of the dog. The dog was trying to get away from her, and it bit her hand.

Do you think the plaintiff is responsible for what happened to her?

Absolutely.

Now the defense folks realize their client is nasty.

Now for damages. I show a slide of the plaintiff's hand. And of course, when you look at it, anybody would say "What? \$900,000 for some stitches?"

Well, it's more than that. So I go into her symptoms. She's got inflammation. She's got acute pain. Difficulty sleeping. Anxiety. I'm getting into harms and losses at this point.

But I need a bodyguard for her symptoms. So I show them the list of drugs the plaintiff has had to take since the dog bit her – a listing of each drug with all its side effects from the *PDR*. Then we match these up with her symptoms. And on the slide, we highlight the symptoms we've found in the plaintiff's medical records.

Next, we teach some medicine: The plaintiff has complex regional pain syndrome, which used to be called reflex sympathetic dystrophy. We take our slide right off the National Institute of Health web site. We go through the treatment, we go through the prognosis. The web site tells us it's a poor prognosis.

Next, her other harms and losses. What did she love to do? Now you're talking about the intangibles. Every client is different. Getting this part of the presentation together takes time.

Our client had given us photos, so we have slides of her on horseback and snow skiing. She also liked snowmobiling, water skiing, hiking, tennis. We don't have pictures of her doing those things. But we show stock pictures off the Internet, so the viewer can imagine it.

We also have lay witnesses lined up to talk about her having done these things.

Now the boil-down: What did she love to do? She can't do it anymore. We show the photos again, with that universal red symbol with the line through it. Everyone knows that symbol. That goes across every photo. Is this kind of thing effective? It worked in this case.¹⁰⁴

Then we get into what she could do before she got hurt. She could drive. She could cook. She could write. She could self-groom. All that stuff. Now she needs help with everything. This is a fast way to tell the story.¹⁰⁵

So what is she left with? That's the last step. You've talked about fixing what can be fixed and helping what can be helped. The Life Care Plan is part of what can be fixed or helped.¹⁰⁶

The way I see it, the defendant wants to treat your client like a potted plant. Set her in the corner, water her, and that's it. Well, that's the smallest part of the case.

The biggest part of the case is what you're left with: what can't be fixed or helped. In this case, that's her chronic pain, along with the condition of her left hand. The psychological problems, which she had only some of before, and her difficulty now falling and staying asleep.

Incidentally, doesn't it seem as if every client was already bipolar, depressed, has anxiety, has a serious previous psychiatric history? When you have a client like that, or with any other pre-existing problems, you say, "We're not asking for money for what she already had. We're just asking for money for what the defendant made worse."

I show a slide that charts them all. Can she do this, this, this, this, this? You need to go deep into this. Does she need help with cooking? We use one line for each question. And we have a checkmark "no" for all those things.

Then you get into what you need for restoring the balance. We list a driving service. A housekeeper. An attendant. Personal assistants. A masseuse. Whatever she needs.

Next slide: What happens when the money runs out? You take it from the present up to 2036. This slide can scare them to death.¹⁰⁷

104 **Ball note:** Whether in mediation or opening, it is best to show the deficits first, followed by the way her life used to be.

105 **Ball note:** In both mediation and trial, the best way to sow these points is to build them around little stories from lay witnesses. The human brain is hard wired for stories.

106 See pps. 28-31 in *Damages* for the concept of "fix, help, and make up for."

107 **Ball note:** Alvin demonstrates his considerable smarts here, because most attorneys leave this crucial point out. With a life-care plan, always explain in trial that *on this date all the money, including all interest and all dividends, will run out – right when she'll need money the most*. Then provide a figure for each additional three or five years she could live. Lack of resources to survive is a major Reptilian fear, and it resonates. And remember this: Once she reaches her current life expectancy, she has a new – higher – life expectancy. In fact, every year that someone lives requires an upward revision of life expectancy. You should ask forensic epidemiologist Michael Freeman (who wrote Chapter Twelve above) to send you his valuable notes about life expectancy. He's at forensictrauma@gmail.com.

Then back to the liability. Remember, we already back-chained it from 2009, when the dog bit the plaintiff. This new timeline goes all the way back to 2006. We show a chart: What the homeowner concealed is below the line; what happened to my client goes above the line.

On that chart, I show the evil underneath and the current reality (about my client) on top. We include what she's endured since the dog bit her, including the medicine, the doctors, everything. It's a summary of everything she's done.

Now I get into punitive damages. Punitives were a big factor in getting this case settled, because the homeowner's private lawyers pounded on the insurance company to "pay them, pay them, pay them."

Maybe by this time it looks like I didn't get her much money at all. \$900,000. But it was a dog bite case in a traditionally low-verdict area.

Credit for the settlement during trial started with what we did in mediation. In trial, once the defense insurance sees opening and a witness or two, they know we're going to fulfill what we showed in opening. So they want out. Just what we want.



KEN ALTMAN

For the past 20 years, Ken has dedicated his entire professional life to helping injured people. He is the Senior Managing Partner and Litigator for the Mississippi division of Morris Bart and Associates, a large multi-state personal injury law firm. Ken is dually Board Certified in Civil Trial Advocacy and Civil Pre-Trial Advocacy by the National Board of Legal Specialty Certification, and for the past three years has been selected for inclusion in "Super Lawyers" of the Mid-South. He is rated AV Preeminent by Martindale-Hubbell, the highest rating available. Ken is licensed to practice law in Mississippi, Louisiana and Florida. Over the past three decades, Mr. Altman has obtained tens of millions of dollars in compensation from rule breakers who needlessly hurt his clients. He has obtained many six figure and several seven figure resolutions.

Ken is a competitive sailor and sailing enthusiast, and has served on the boards of directors of several sailing non-profit organizations. He is also a multiple year Florida and Mississippi state Judo champion and was a member of the 2001 U.S. Team competing in the World Maccabiah Games in Israel.

CHAPTER NINETEEN

One Week After My First Reptile Seminar

*An accident is something that happens without
the input of a person. A mishap is when someone violates
a rule and causes harm to someone else.*

—My client

I practice in southern Mississippi, one of the most beautiful areas of the country. Located on the Gulf of Mexico, we have the most diverse array of flora, fauna and nature. The lifestyle is laid back and relaxed; the people are down to earth. Fishing and hunting are a way of life and faith is central to the lives of most. It is a conservative area.

My case involves a rear-end collision. The morning of trial, the judge says, “Well, Mr. Altman, we had a zero verdict last week on another case.” In a neighboring county, as you drive both into town and out of town, are two large official state signs that read: “Jesus is Lord over Picayune.” And to start the court term, the judges bring in a preacher. He gets up with his Bible and prays for the Court, the lawyers, and the gallery. “Jesus please protect this Court and the people and help them find justice. In Jesus Christ’s name, we pray. Amen.” That is South Mississippi.

But the Reptile gave me a fair shake in front of some of the most conservative, G-d-fearing, lawyer-hating, claimant-loathing citizens you’ll ever meet.

My client had been rear-ended on the interstate by a guy driving like a maniac, swerving in and out of traffic. Despite that, the judge struck my punitive damage claim. And the morning of trial, the defense stipulated negligence and proximate cause.

The judge says, “Mr. Altman, what witnesses do you intend to call?”

I say, “The police officer, the eyewitness and –”

The judge cuts me off and says, “No, you’re not going to try liability.”

“I’m not.”

“Then why are you calling the police officer and the witness?”

“For damages. The police officer will testify about my client’s condition at the scene. He is also going to explain what’s in the photographs.”

“All right. But the eyewitness? I’m not going to let you try liability, you don’t need an eyewitness.”

“I am not calling him for liability.”

“You’re not calling him, Mr. Altman.”

“Judge, then I need to make a proffer on the record of what his testimony was going to be.”

She says, “Fine, during lunch.”

So the judge was, at the minimum, hostile. “Mr. Altman, maybe you haven’t tried enough cases in front of me. When I say something is not going to happen, it’s not going to happen.” I swear I saw steam coming off her head. I knew it was going to be one of those trials.

But I was armed with the Reptile.

We get to jury selection. I have tried many car-wreck cases for a long time now. I have a good voir dire and connect with the juries well. But you know what? Those which-way-do-you-lean questions, they are golden. “Which way do you lean? Just a little bit this way or this way?” They’re simple, but they work. “Tell me about that.” What brilliant words, “Tell me about that.” Whatever they say, I ask, “Tell me more.” And, “Please tell me more” after that.

So I start with, “Some folks think highway travel is safer these days than, say, 10 years ago. Other folks think it’s less safe. From your own experience, which way do you lean?” And then, “Tell me about that.” That gets discussion going. Then I ask, “OK, who feels the same way?” Once I have squeezed that grapefruit as much as possible, I go into, “What kind of things do you want to see in drivers on the road?” And, “What close calls or wrecks have you seen because someone did something dangerous?”¹⁰⁸

I see opposing counsel getting ready to object. She does not like where I am going. But the jurors are talking. “Tell me about that. What are the most common dangers you see other drivers do?”

Defense counsel gets up. Before she finishes her objection, the judge says, “Sustained, move on.”

And every objection in the trial was like that – but that’s OK, because my confidence grew as the Reptile awoke.

I go on to preponderance. I use David Ball’s template¹⁰⁹: “In cases like this, jurors make their decisions on the basis of whether my side is more right than wrong.” One hand up, the other a bit down; it is the way I am going to argue my burden of proof. It works.

Because this is now a stipulated liability case, I ask, “The defendant has admitted fault. Some folks believe that when a defendant admits fault you should cut him a break when it comes to the size of the verdict; other folks feel that whether someone admits fault should make no difference in the size of the verdict. Which way do you lean?” That starts some good discussion.

So does, “In cases where a person is injured but now they’re all better, some folks believe he’s entitled to compensation – including pain and suffering – for the time he

108 **Ball note:** These are good questions. But be sure you know what information you are trying to get. These are not mere “conditioning” questions, which will hurt more than help you. You need to know juror attitudes.

109 See *Damages* 3, Chapter Three.

was hurt. Other folks believe that if he's all now all better now, he should get nothing for pain and suffering because the pain and suffering are over. How many of you are closer to the folks who believe there should be no money for pain and suffering?" It goes off like a bomb. A dozen hands go up: "People should only sue for medical expenses and wage loss." "I agree with her. Too many frivolous lawsuits out there." "I concur." A vocal contingency says that unless someone is permanently hurt, they should not collect beyond bills and wages. I identify four folks who feel so strongly about this that nothing was going to sway them. I said, "Even if the judge told you differently, you couldn't do it?" "No, I couldn't."¹¹⁰

The Reptile voir dire does its job and I have identified my targets. I get two struck for cause.

And I know who the others are, so I know where my peremptories are going.

My opening? Pure Reptile. I use the Ball template, and it works. It makes it simple, it makes it direct. See Chapter Five in *Damages* 3.

"A driver is never allowed to needlessly endanger the public," I say. "A driver has to look where he is going. If he does not and as a result he hurts someone, the driver is responsible for the harm." It is simple, it is elegant, and it is beautiful. The jury understands it. Then I tell the story of what the defendant did – in short sentences, present tense, active sentences: "Joe Smith drives down the interstate. Joe Smith changes lanes. Joe Smith swerves from one lane to another. . . ." It focuses the case on the defendant's conduct: In their eyes, the case is now about that big bad rule breaker. It is truth, it works.

At the story's end, "This is Peter Plaintiff. Joe Smith's driving broke his back."

Undermining: Liability was not an issue, so there was not much to undermine there. *Damages* were a different story and I had to undermine defense claims about the effects of my client's previous condition. My client has other health conditions. He used to be really heavy and has all the problems associated with that. He had bariatric surgery and he has diabetes.

He was only treated for two months for what happened in the wreck. He spent a month in a brace and was out of work. But after two months he had no more treatment and returned to his job. Two years later – a mere seven months before trial – his neck starts hurting. He goes to a chiropractor. The chiropractor has him fill out a form: "Is this as a result of an accident?" His answer: A question mark.

So in opening, I say, "Look, we cannot show you we are more likely right than wrong about this new neck pain. So we're not going to ask you for money for it. But we did put the records in so you could see it." As a result of this honest admission, I instantly gain credibility.

110 See *David Ball on Damages* Edition Three, pps. 312-315, on cause challenge strategy.

When I talk about Peter's losses and harms in opening, I focus on humiliation, isolation and lack of mobility.¹¹¹ After he left the hospital, he couldn't have a bowel movement. That led to a horrible experience at home. Humiliating. His girlfriend was there. He had to unimpact himself.

That testimony was real: It came from the heart from him and from her. What can be more degrading to the human soul and spirit? While his girlfriend's holding him and he's screaming in pain, he's trying to get the shit out of his ass.

In trial, I call the police officer. We talk about the rules he follows when investigating a wreck, and why those rules are important. He shows the photos and says my client was taken from the scene by the ambulance. Fifteen minutes and he is gone.

I call the eyewitness. The judge says, "Counsel to the bench." I go. "Is this that witness you were talking about earlier?"

"Yes, your Honor."

"Why?"

"He saw the impact. It shows how badly Peter was hurt. This witness saw the plaintiff's vehicle go a foot up in the air. This witness saw the defendant not brake until 10 feet before hitting my client. This witness saw my client's vehicle spinning. This witness was the first person to my client's truck and saw him unconscious. This witness stayed with him until the police and the ambulance personnel arrived."

So the judge had to relent. "OK, I'll let you do that, but no talk about swerving before the wreck."

I call the witness. "What did you see?"

"I saw the SUV slam into the back of that pickup truck."

"What happened when it slammed into it?"

"The back end went flying up in the air and back down. He went spinning around in a circle and ended up by the side of the road. The other vehicle ended up over there."

Succinct and powerful.

The medical testimony was admittedly weak. The hospital's treating doctor says, "He did really well. He returned to work with no restrictions." Thanks a lot, doc. The family doctor says, "He did mention this auto accident to me once. I think he said his back was hurting. But he never said anything again and I didn't change any medicines for him." Not great testimony.

But the highlight was my client. He was an excellent witness and well-prepared, thanks to the Reptile.¹¹² Defense counsel says, "Now Mr. Plaintiff, you were a safety engineer at NASA, weren't you?"

"Yes ma'am, 20 years."

"And you investigated accidents, traumas, and so forth?"

111 See *Reptile*, 75-79, 88-92.

112 See *REPTILE: Keenan Method to Witness Preparation*, DVD.

“Yes, anything on-site, OSHA compliance and so forth, I investigated all kinds of accidents.”

“You agree accidents sometimes just happen?”

Peter says, “Yes ma’am. Sometimes. **But an accident is something that happens without the input of a person. A mishap is when someone violates a rule and causes harm to someone else.**”¹¹³

You could hear a pin drop in the courtroom. It was precious. Defense counsel didn’t even sputter.

I said, “No further questions.” So the Reptile is doing pretty good. The jury is tuned in. They are feeling it, they understand it. I was going to get a verdict in the case. It is going to happen. The only question is how much.

I did not call the defendant. He is just this unknown guy the jury is pissed off at. Why touch that? I had taken his deposition; I had plenty to impeach him. The defense attorney was posturing: “I am going to call him; I am going to call him.” I said, “OK.” She didn’t call him.

In closing, I summarize mobility, isolation, embarrassment (humiliation). See Chapter Seven, *Reptile*.

The jury was out 15 minutes. I knew I was getting a verdict. \$140,000, the best I ever received in this county. So now I am excited about what I am still learning (remember, this was my first Reptile trial). Right now I’m going through *David Ball on Damages 3* with a fine-tooth comb.

I went in there as a Reptile novice. Now, I don’t suggest you do that. I suggest that you embrace it fully, get it under you and get it into your practice. I know I am not letting up, and I expect that more good verdicts will follow.

113 **Ball note:** Memorize those words and use them!



DON CHANEY

See Bio at the beginning of Chapter Ten



NATHAN P. CHANEY

See Bio at the beginning of Chapter Eight



TAYLOR CHANEY

S. Taylor Chaney has practiced injury law since 2010 with his father, Donald Price Chaney, Jr., his brother, Nathan Price Chaney, and his sister-in-law, Hilary Martin Chaney. The Arkansas Trial Lawyers Association awarded the Chaney Law Firm the Outstanding Trial Lawyers of the year award in 2013, which was the first time in the organization's 50 year history that the recipient of the award went to an entire law firm. Taylor is active in many leadership roles with the Arkansas Bar Association, Arkansas Trial Lawyers Association, and other civic organizations.

CHAPTER TWENTY

Plaintiff's Motion, Brief in Support of Plaintiff's Motion, and Order to Exclude Evidence and Argument Relating to the "MIST" Defense Theory under the *Daubert* Test

IN THE CIRCUIT COURT OF [insert county] COUNTY, ARKANSAS CIVIL
DIVISION

[insert client]

PLAINTIFF

v.

CV- 201__ - __

[insert defendant]

DEFENDANT

MOTION TO EXCLUDE EVIDENCE AND ARGUMENT RELATING TO THE "MIST" DEFENSE THEORY UNDER THE *DAUBERT* TEST

The Plaintiff, [insert plaintiff], for [his/her] *Motion to Exclude Evidence and Argument Relating to the "MIST" Defense Theory Under the Daubert Test*, states:

- The Defendant's *Answer* to the Plaintiff's *Complaint* denies that the Plaintiff was injured in the motor vehicle collision at issue in this case.¹¹⁴ In [his/her] written discovery responses inquiring as to how the collision occurred, the Defendant stated that the contact between the vehicles "was quite subtle," and that "there was only minimal, to no, damage to both vehicles."¹¹⁵ **[tell why we think they're going to use the MIST defense, and attach any applicable exhibits showing such; file this motion as soon as they given an indication that the MIST defense is coming]** As a result, the Plaintiff anticipates that Defendant will argue at trial that the Plaintiff could not have been and/or was not injured in the collision. This defense theory is known as the "Minor Impact – Soft Tissue" ("MIST") theory, or the "No Damage, No Injury" theory.

¹¹⁴ Def.'s Ans. And Mot. to Dismiss ¶ 3 [month, day, year].

¹¹⁵ See Def.'s Response to Pl. 's 1st Set Interrogs. No. 7 [month, day, year].

- The Defendant has identified no experts that will testify on [his/her] behalf.
- <<<**<OPTION: When a deposition has established, or RFAs have been sent out establishing that Defendant has no foundation to predict whether Plaintiff was hurt or not: [insert proper name of Defendant] is not a licensed physician, and does not have the requisite education in the fields of engineering, physics, or biomechanics to testify about such matters.**

Moreover, [he/she] has no training or experience in either diagnosing or treating spinal ligament injuries.¹¹⁷ Likewise, [insert proper name of Defendant] has no training or experience in the injury mechanism that causes spinal ligament injuries.¹¹⁸ [he/she] also has no training or experience in accurately predicting an occupant's injuries following motor vehicle collisions, based solely on property damage, or otherwise. Furthermore, [insert proper name of Defendant] has not observed the Plaintiff since the collision.¹¹⁹ >>>

- Attached as Exhibit to this motion is an Affidavit from the Plaintiff's treating chiropractic physician, Dr. _____, which demonstrates Dr. _____'s knowledge, education, training, and experience in treating motor vehicle collision injury victims. As a treating physician in the chiropractic profession in the state of Arkansas, Dr. _____ reasonably relies upon the articles, textbooks, clinical practice guidelines, visual aids, and other documents attached to Exhibit [??] as being reliable and authoritative with respect to the subject matter discussed within this motion.¹²⁰
- Peer-reviewed scientific articles that illustrate the mechanism of spinal ligament injuries (commonly referred to as "whiplash" or "soft tissue" injuries) are attached to Exhibit [??],¹²¹ in addition to peer-reviewed scientific literature that explains how to determine the severity of ligamentous injuries in various sections of the spine.¹²² Also attached to Exhibit [??] are clinical practice guidelines pertaining to the treatment of whiplash-associated disorders that Dr. _____ relies upon in formulating the frequency and duration of his treatment plan for any given patient.¹²³

116 Def. 's Response Pl. 's Second Set Req. Admis. 1-4 [month, day, year], attached as Exhibit.

117 *Id.* at 6-7.

118 *Id.* at 9-10.

119 Def.'s Ans. And Mot. to Dismiss ¶ 3 [month, day, year].

120 See Def.'s Response to Pl. 's 1st Set Interrogs. No. 7 [month, day, year].

121 Def.'s Response Pl. 's Second Set Req. Admis. 1-4 [month, day, year], attached as Exhibit.

122 *Id.* at 6-7.

123 *Id.* at 9-10.

Dr. _____ frequently observes insurers and other defense agents arguing that if there is little property damage to vehicles involved in a collision, then there cannot be a significant injury.¹²⁴ In this case, the Defendant's anticipated use of the MIST theory of defense is not supported by the scientific literature, as demonstrated by the peer-reviewed scientific articles that debunk the MIST theory, which are attached to Exhibit [???]. Specifically, these articles demonstrate that there is no scientific evidence to support the MIST theory's contention that lower speeds of impact or little property damage in a collision results in little or no personal injury to occupants of vehicles involved in such collisions.

In fact, these studies explain that the opposite of the MIST theory is true due to the way vehicles are designed. A publication by the U.S. National Highway Traffic Safety Administration, which explains that a bumper "is not a safety feature intended to prevent or mitigate injury severity to occupants"¹²⁵ Indeed, the explicit purpose for federal regulation of bumper systems is "to reduce physical damage to the front and rear ends of a passenger motor vehicle from low speed collisions."¹²⁶ Because vehicles are designed to resist damage in low-speed collisions, the drivers of vehicles involved in collisions (particularly rear-impact collisions) are subjected to higher g-forces than drivers whose vehicles crush upon impact.¹²⁷

According to Ark. R. Evid. 702, if a witness seeks to testify about scientific or technological facts that will assist the trier of fact, the Court must decide whether such evidence meets minimum scientific standards of reliability.¹²⁸

- Based upon the studies debunking the MIST defense theory, and other documents attached herein, such theory should be excluded for the following reasons:
 1. It is not scientifically valid;
 2. It is irrelevant and unreliable;
 3. It is not generally accepted as reliable in the scientific community;
 4. It is based upon false principles and methodology; and
 5. Its introduction to the jury would be unfairly prejudicial under Ark. R. Evid. 403.

¹²⁴ *Id.* at ¶ 19.

¹²⁵ *Id.* at ¶ 23.

¹²⁶ 49 C. F. R. § 581. 2.

¹²⁷ See attached Exhibit [???], Aff. Dr. _____ ¶ 23.

¹²⁸ *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. 105, 14 S. W. 3d 512 (2000) (adopting the *Daubert* test set forth in *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993)).

Exclusion of the MIST theory should also extend to the defense's use of the following methods in an attempt to advance the MIST theory:

- a. Photographs of the subject vehicles offered for the purpose of proving a lack of injuries sustained by the Plaintiff because such photographs neither fairly nor correctly portray the Plaintiff's injuries;¹²⁹
- b. Terms that quantify the type of crash, such as "tap" or "bump;"¹³⁰
- c. Arguments or testimony referring to "common sense" as it relates to the mechanics of the collision and injury causation, because causation of permanent spinal ligament injuries sustained in motor vehicle collisions lies outside the common knowledge of the jury;¹³¹ or . Claims that medical treatment following the collision were neither reasonable nor necessary based on photographs of

129 *McMickle v. Griffin*, 369 Ark. 318, 334, 254 S. W. 3d 729, 743 (2007); *Rich Mountain Electric Coop., Inc. v. Revels*, 311 Ark. 1, 7, 841, S. W. 2d 151, 154 (1992); see also *Hooks v. General Storage & Transfer Co.*, 187 Ark. 887, 892, 63 S. W. 2d 527, 530 (1933) (holding that photographs introduced for any purpose other than to show vehicle property damage should have been limited by proper instructions from the trial court); 29A Am. Jr. 2d *Evidence* § 975 ("To be admissible, a photograph must be a reasonably faithful representation of the object depicted and aid the jury in understanding the testimony or evaluating the issues."); 31A C. J. S. *Evidence* § 1251 (2010) ("A photograph is admissible only if it is accurate, and is a fair and accurate representation of what it purports to represent. . .").

130 *Davis v. Maute*, 770 A. 2d 36, 40-41 (Del. 2001) ("Counsel may not argue by implication what counsel may not argue directly." As a result, "defense counsel's characterization of the accident as a "fender-bender" was improper. By playing down the seriousness of the accident, Maute's counsel unmistakably suggested-without support in expert testimony-that the accident could not have caused serious personal injury to Davis."); accord. *Little R. R. & E. Co. v. Goerner*, 80 Ark. 158, 167, 95 S. W. 1007, 1011 (1906) (it is reversible error for counsel to "place before the jury as evidence indirectly by argument that which could not be produced directly in the proof.").

131 See attached Exhibit [???], Aff. Dr. _____ ¶¶ 10-30; *McAway v. Holland*, 266 Ark. 878, 882, 599 S. W. 2d 387, 389 (1979); *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 238-39, 148 S. W. 3d 754, 759 (2004) (expert testimony is required when the asserted cause of an injury "does not lie within the jury's comprehension as a matter of common knowledge. . ."); see generally 31A Am. Jur. 2d *Expert and Opinion Evidence* § 152 (2013) ("The opinion of a nonexpert witness is generally not competent evidence with regard to diagnosis and the potential continuance of a disease, which must be established by a physician as an expert witness."); 31A C. J. S. *Evidence* § 730 (2010) (explaining that "a non-physician may not opine on medical causation matters, and a nonexpert or lay witness may not testify as an expert and give expert testimony as to the effect of an injury, the existence or non-existence of a disease discoverable only through the training and expertise of a medical expert, or testify that the witness' subjective condition was the proximate result of an accident.").

the vehicles, because there is not a sufficient foundation for evidence or argument that photographs of the vehicles correlate to the Plaintiff's injuries.¹³²

WHEREFORE, the Plaintiff seeks to exclude argument or the introduction of any evidence, by testimony or otherwise, that the minor impact between and/or lack of damage to the parties' vehicles correlates to a lack of severity of the Plaintiff's injuries sustained in the motor vehicle collision at issue in this lawsuit, as well as any and all other relief to which she may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September, 2013, I served the foregoing document by facsimile upon the opposing party's attorney of record listed below:

VIA U.S. MAIL

[insert defense attorney]

[insert defense law firm]

[insert address of defense law firm]

[insert city, state, zip]

S. Taylor Chaney

132 See *Blissett v. Frisby*, 249 Ark. 235, 247-48, 458 S. W. 2d 735, 742 (1970) (“[T]he trial judge has . . . discretion in deciding whether there is sufficient foundation for the admission of testimony giving the amount of certain expenditures.”); *Bell v. Stafford*, 284 Ark. 196, 199-200, 680 S. W. 2d 700, 703 (1984) (a foundation must be laid to establish a causal relationship between a collision and medical expenses); see generally 29A Am. Jur. 2d *Evidence* § 977 (explaining that “absent expert testimony on the correlation between vehicular damage and a plaintiff’s injuries, photographs of the parties’ damaged vehicles are not relevant, when no medical expert witnesses testify that the amount of damage to the plaintiff’s vehicle correlates to his or her injuries.”); 31A C. J. S. *Evidence* § 697 (2010) (explaining that lay witness testimony “as to damages is inadmissible where a proper foundation has not been laid, or the opinion is based on speculation.”).

IN THE CIRCUIT COURT OF [insert county] COUNTY, ARKANSAS CIVIL DIVISION

[insert client]

PLAINTIFF

v.

CV- 2010-192

[insert defendant]

DEFENDANT

**BRIEF IN SUPPORT OF PLAINTIFF’S MOTION TO EXCLUDE EVIDENCE
AND ARGUMENT RELATING TO THE “MIST” DEFENSE THEORY UNDER
THE *DAUBERT* TEST**

a. INTRODUCTION.

The Plaintiff anticipates that one of the defenses in this case will be to contend that the collision between the Defendant’s automobile and the vehicle [owned, drive, occupied] by the Plaintiff caused “minimal damage” to the Plaintiff’s vehicle, and therefore could not have and/or did not cause the injuries sustained by the Plaintiff. This contention is not based upon scientific evidence, but rather is based upon a policy adopted by national auto insurers in the 1990’s.¹³³ Peer-reviewed scientific studies demonstrate that property damage is an unreliable metric when used to predict injury in low-speed collisions, and as such the MIST theory is an invalid and unreliable method to predict injury.¹³⁴

Under the *Daubert* test, scientific evidence that is unreliable may not be introduced to the jury.¹³⁵ Since the Defendant’s MIST theory is unreliable, it must be excluded.

b. STANDARD OF REVIEW.

Ark. R. Evid. 702 governs the admission of scientific evidence.¹³⁶ Such rule states as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

¹³³ See attached Exhibit [???], Aff. Dr. _____ § 19 ([month, day year]).

¹³⁴ *Id.*

¹³⁵ *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), adopted by the Arkansas Supreme Court in *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. 105, 14 S. W. 3d 512 (2000).

¹³⁶ Ark. R. Evid. 702 is identical to Fed. R. Evid. 702.

The trial court's role in determining whether scientific evidence should be admitted is one of a gatekeeper.¹³⁷ In its gatekeeper role, the trial court must ensure that testimony "rests on a reliable foundation and is relevant to the task at hand," and "pertinent evidence based on scientifically sound principles will satisfy those demands."¹³⁸

With respect to expert testimony, the Rules of Evidence seek to ensure that evidence is relevant, reliable, and supported by appropriate validation. While the Rules of Evidence permit an expert to testify as to an opinion that "embraces an ultimate issue to be decided by the trier of fact,"¹³⁹ expert witnesses are not permitted to give testimony that tells the jury which result to reach.¹⁴⁰

In order to properly determine whether scientific testimony should be admitted, the trial court must preliminarily determine whether a witness is proposing to testify to "(1) scientific evidence that (2) will assist the trier of fact to understand or determine a fact in issue."¹⁴¹

This requires an assessment of whether the testimony is scientific in and of itself, and if so, an assessment of whether the reasoning underlying the testimony is scientifically valid, and whether such reasoning can be applied to facts in that particular case.¹⁴² Several factors are relevant in making this determination, and the trial court should consider the following in doing so:

Whether the theory involves scientific principles and methods;¹⁴³

Whether the theory can be and has been tested;¹⁴⁴

Whether the theory has been subjected to peer review and publication;¹⁴⁵

The known or potential rate of error of the theory;¹⁴⁶ and

General acceptance of the theory.¹⁴⁷

137 *Daubert*, 509 U.S. at 597, 113 S. Ct. at 2798-99.

138 *Id.* at 597, 113 S. Ct. at 2799.

139 *Id.* at 587-92, 113 S. Ct. at 2793-2796.

140 *Gramling v. Jennings*, 274 Ark. 346, 625 S. W. 2d 463 (1981).

141 *Daubert*, 509 U.S. at 592, 113 S. Ct. at 2796.

142 *Id.* at 592-93, 113 S. Ct. 2796.

143 Ark. R. Evid. 702.

144 *Daubert*, 509 U.S. at 593, 113 S. Ct. at 2796.

145 *Id.* at 593-94, 113 S. Ct. at 2797.

146 *Id.* at 594, 113 S. Ct. at 2797.

147 *Id.*

EXPERT TESTIMONY IS REQUIRED TO ADVANCE THE MIST THEORY.

A. Lay witness testimony cannot support advancing the MIST theory.

As an initial matter, the court must determine whether the MIST theory is scientific to the extent that the Defendant must have an expert to testify about it. If it is not, then lay witness testimony may be permitted regarding the MIST theory. When a witness does not testify as an expert, their testimony in the form of opinion or inferences is limited to those opinions or inferences as follows:

- (1) Rationally based on the perception of the witness; and
- (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.¹⁴⁸

In order to satisfy the first requirement above, the witness must have personal knowledge of the matter.¹⁴⁹ If this requirement is met, then the testimony must pass the rational connection and helpful test.¹⁵⁰ If both of the requirements are met, then the witness “may express the opinion or inference rather than the underlying observations if the expression would be helpful to a clear understanding of his testimony or the determination of a fact in issue.”¹⁵¹ On the other hand, if “*an opinion without the underlying facts would be misleading, then an objection may be properly sustained.*”¹⁵² While lay witness testimony “is allowed in observation of everyday occurrences, or matters within the common experience of most persons,” “*if attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the Rule.*”¹⁵³

148 Ark. R. Evid. 701; *see generally* 31A Am. Jur. 2d *Expert and Opinion Evidence* § 150 (2013) (“A nonexpert (lay) witness . . . may testify to the distinct facts observed by him or her concerning the apparent physical condition or appearance of another, but may not testify to the existence or nonexistence of a disease, the discovery of which requires the training and experience of a medical expert.”); 31A C. J. S. *Evidence* § 683 (2010) (explaining that “lay witness[es] should not be allowed to express an opinion on a matter beyond the witness’ competence, such as a medical opinion.”).

149 Ark. R. Evid. 602.

150 *Carton v. Missouri Pac. R. R.*, 303 Ark. 568, 571-72, 798 S. W. 2d 674, 675 (1990) (“the rational connection test means only that the opinion or inference is one which a normal person would form on the basis of the observed facts”).

151 *Id.*

152 *Id.* (emphasis added).

153 *Felty v. State*, 306 Ark. 634, 639-40, 816 S. W. 2d 872, 875 (1991) (emphasis added).

The Plaintiff acknowledges that the Defendant may testify as to his observations on the day in question, including [his/her] observation of the Plaintiff. However, the Court should prohibit the Defendant from using property damage photographs, or otherwise arguing, or offering proof that property damage somehow correlates to a lack of injuries to the Plaintiff, because it would not be helpful, and would also mislead the jury.¹⁵⁴

B. The MIST theory lies outside the common knowledge of the jury.

The MIST theory deals with physics, biomechanics, and other fields of specialized knowledge in collision dynamics, and applying such theory to the facts at bar requires resolution of the following issues:

- The amount of force required to cause a given degree of vehicle damage;
- How much of that force that would be transmitted to the plaintiff;
- The amount of force required to cause the plaintiff's injuries;
- What kind of injury the plaintiff would or would not get in the subject crash;
- The amount and type of treatment needed for the plaintiff's injuries; and
- How long it should have taken the plaintiff to recover.

The answer to each of these questions lies outside the common knowledge and experience of the jury. The definition of "common knowledge" is "a fact that is so widely known that a court may accept it as true without proof."¹⁵⁵

The dual-mode injury mechanism occurs in less than one-third (1/3) of a second (300 milliseconds), such that motor collision victims are not consciously

154 *Id.*; Ark. R. Evid. 403; *see generally* 31A Am. Jur. 2d *Expert and Opinion Evidence* § 176 (2013) ("The determination of the cause and manner which led to a person's . . . injury . . . is generally scientific in origin and outside the common knowledge of layperson jurors."); 31A Am. Jur. 2d *Expert and Opinion Evidence* § 188 (2013) ("Expert opinion evidence may be helpful regarding the validity of a plaintiff's complaints of pain because jurors' lack of experience or knowledge of the subject might prevent their drawing correct conclusions from the facts proved."); 31A C. J. S. *Evidence* § 730 (2010) (explaining that "a non-physician may not opine on medical causation matters, and a nonexpert or lay witness may not testify as an expert and give expert testimony as to the effect of an injury, the existence or non-existence of a disease discoverable only through the training and expertise of a medical expert, or testify that the witness' subjective condition was the proximate result of an accident.").

155 *Black's Law Dictionary* 231 (Bryan A. Garner ed., 8th ed., West 2005); *see also* Ark. R. Evid. 201 ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

aware of the actual injury mechanism.¹⁵⁶ An “S-curve” ripples through the neck as the torso ramps up the seat back while the head momentarily remains still; a hyperextension/hyperflexion injury occurs when the head is snapped back and forth, wherein the neck exceeds its physiological limits.¹⁵⁷ Furthermore, determining the nature, extent, and duration of spinal ligament injuries requires performing and interpreting flexion and extension X-rays to know whether or not a collision victim has a loss of motion segment integrity.¹⁵⁸ These aspects of motor vehicle collision trauma are not widely known.¹⁵⁹ As a result, the Court may not accept facts about causation and damages as true without competent proof.¹⁶⁰ Accordingly, the mechanism of the Plaintiff’s injuries, and the Plaintiff’s injuries themselves are not common knowledge.

<<<OPTION: When MIST questions have been answered through RFAs or through deposition: [insert proper name of Defendant] is not a licensed physician, and does not have the requisite education in the fields of engineering,

156 See attached Exhibit [???], Aff. Dr. _____ ¶ 12; attached Exhibit [???], visual summary of the injury mechanism in a rear-impact case; see also attached Exhibit [???], Jonathan N. Grauer, Manohar M. Panjabi Jacek Cholewicki, Kimio Nibu & Jiri Dvorak, *Whiplash produces a S-shaped curvature of the neck with hyperextension at lower levels* 22(21) Spine 2489 (1997); and attached Exhibit [???], Koji Kaneoka, Koshiro Ono, Satoshi Inami & Koichiro Hayashi, *Motion Analysis of Cervical Vertebrae during Whiplash Loading* 24(8) Spine 763 (1999).

157 See attached Exhibit [???], visual summary of the injury mechanism; attached Exhibit [???], Jonathan N. Grauer, Manohar M. Panjabi Jacek Cholewicki, Kimio Nibu & Jiri Dvorak, *Whiplash produces a S-shaped curvature of the neck with hyperextension at lower levels* 22(21) Spine 2489, 2492-93 (1997); and attached Exhibit [???], Koji Kaneoka, Koshiro Ono, Satoshi Inami & Koichiro Hayashi, *Motion Analysis of Cervical Vertebrae during Whiplash Loading* 24(8) Spine 763 (1999).

158 See attached Exhibit [???], Aff. Dr. _____ ¶¶ 11-17; see also attached Exhibit [???], Linda Cocchiarella & Gunnar B. J. Andersson, *Guides to the Evaluation of Permanent Impairment* 379 (5th ed. AMA Press.)

159 See generally 31A Am. Jur. 2d *Expert and Opinion Evidence* § 176 (2013); 31A Am. Jur. 2d *Expert and Opinion Evidence* § 188 (2013); 31A C. J. S. *Evidence* § 730 (2010).

160 *McAway v. Holland*, 266 Ark. 878, 882, 599 S. W. 2d 387, 389 (1979) (“If the subject matter is wholly scientific or so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease, or physical condition.”); *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 238-39, 148 S. W. 3d 754, 759 (2004) (holding that expert testimony is required when the asserted cause of an injury “does not lie within the jury’s comprehension as a matter of common knowledge. . . .”); see generally 31A Am. Jur. 2d *Expert and Opinion Evidence* § 158 (2013); 31A C. J. S. *Evidence* § 730 (2010).

physics, or biomechanics to testify about these questions.¹⁶¹ [He/She] has neither the training, nor the experience to give testimony about either treating or diagnosing spinal ligament injuries, and the injury mechanism that causes such injuries.¹⁶² Furthermore, [insert proper name of Defendant] has neither the training nor the experience to accurately predict an occupant's injuries following a motor vehicle collision, based solely on property damage, or otherwise.¹⁶³ [His/Her] only observation of the Plaintiff was on the day in question.¹⁶⁴ Accordingly, the Court should limit [insert proper name of Defendant]'s testimony to what he observed, and not permit [him/her] to give opinions grounded in the MIST theory.

Allowing the MIST theory through lay testimony would invite the jury to speculate.

Because the MIST theory involves matters outside the common understanding of the jury, only a qualified expert may give opinions grounded in the MIST theory.¹⁶⁵ As a result, allowing the jury to hear lay witness testimony, evidence, or argument based upon the MIST theory would invite the jury to speculate. The Delaware Supreme Court has considered whether expert testimony is required to advance the MIST theory and concluded that expert testimony is required:

As a general rule, a party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to

161 Def.'s Response Pl.'s Second Set Req. Admis. 1-4 ([month, day, year]), attached as Exhibit [???].

162 *Id.* at 6-7, 9-10.

163 *Id.* at 12-13, 15-16.

164 *Id.* at 17-18.

165 See *Davis v. Maute*, 770 A. 2d 36, 40-42 (Del. 2001) (excluding unsubstantiated correlation between vehicle damage and injuries, photographs of vehicles, and improper defense argument) accord. *Baraniak v. Kurby*, 371 Ill. App. 3d 310, 317-18, 862 N. E. 2d 1152, 1158-59 (2007) (The effect of holding that photographs of damaged vehicles are always admissible for the purpose of attacking the plaintiff's credibility "would be to allow parties to accomplish indirectly what the courts have already determined is improper absent expert testimony, i.e., to argue or even imply that there is a correlation between the extent of vehicular damage and the extent of a person's injuries caused by an accident. Therefore, upon retrial, absent expert testimony on the correlation between the vehicular damage and plaintiff's injuries, the photographs of the parties' damaged vehicles shall be excluded."); see also *Mc-Away*, 266 Ark. 878, 599 S. W. 2d 387 (upholding the trial court for excluding testimony by lay witnesses about the cause of death without expert medical testimony); *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. at 238-39, 148 S. W. 3d at 759; see generally 31A Am. Jur. 2d, *Expert and Opinion Evidence* § 158 (2013); 31A C. J. S. *Evidence* § 730 (2010).

the extent of the damage to the cars, unless the party can produce competent expert testimony on the issue. Absent such expert testimony, any inference by the jury that minimal damage to the plaintiff's car translates into minimal personal injuries to the plaintiff would necessarily amount to unguided speculation. Since Maute presented no expert testimony on this issue, the trial court properly prohibited Maute from making this argument directly.

* * *

Counsel may not argue by implication what counsel may not argue directly. Applying this principle to the present case, defense counsel's characterization of the accident as a "fender-bender" was improper. By playing down the seriousness of the accident, Maute's counsel unmistakably suggested – without support in expert testimony – that the accident could not have caused serious personal injury to Davis.

* * *

[We can discern no relevancy to the photographs other than to suggest that Davis could not have sustained serious injuries from an apparently minor accident, and this inference is impermissible.¹⁶⁶

Because the Defendant has identified no expert that will provide competent testimony relating to the MIST theory, the defense's anticipated use of the MIST theory must be excluded.

The Plaintiff also anticipates that the Defendant will argue that the MIST theory needs no supporting expert testimony because such theory is "common sense;" however, such arguments are nothing more than "choosing up sides," and should be excluded for lack of helpfulness under Arkansas law.¹⁶⁷ Furthermore, peer-reviewed scientific studies state that the MIST defense theory is anything but "common sense." In order to offer proof or argument on the MIST theory, the Defendant must produce an expert witness whose proposed testimony passes the *Daubert* test. For the reasons set forth below, no expert can pass muster under such test.

¹⁶⁶ *Davis*, 770 A. 2d at 40; *accord. Baraniak*, 371 Ill. App. 3d at 317-18, 862 N. E. 2d at 1158-59.

¹⁶⁷ *Felty*, 306 Ark. at 640, 816 S. W. 2d at 875; *see also McAway*, 266 Ark. 878, 599 S. W. 2d 387; *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. at 238-39, 148 S. W. 3d at 759; *see generally* 31A Am. Jur. 2d, *Expert and Opinion Evidence* § 158 (2013); 31A C. J. S. *Evidence* § 730 (2010).

a. THE MIST THEORY SHOULD BE EXCLUDED BECAUSE IT FAILS THE *DAUBERT* TEST.

A. THE MIST THEORY IS NEITHER RELIABLE NOR VALID.

In this case, the Plaintiff anticipates that the Defendant will advance the MIST theory by arguing that a lack of damage to the vehicles somehow correlates to a lack of injuries sustained by the Plaintiff. The Court must determine whether the Defendant's MIST theory is scientific evidence that will assist the trier of fact in determining the severity of the Plaintiff's injuries. The Court should exclude any such evidence or argument because the MIST theory unquestionably attempts to advance pseudo-scientific evidence that fails the *Daubert* test for the following reasons:

1. The MIST theory involves scientific principles and methods;
2. The MIST theory has been scientifically tested;
3. The results of such testing, which shows that property damage is not a reliable predictor of bodily injury, have been subjected to peer review and publication;
4. The MIST theory is not generally accepted in the scientific community.

Instead of being adopted following rigorous scientific testing, the MIST theory was adopted by an auto insurer seeking to minimize the amount of claims paid:

In the mid-1990s, a set of guidelines was published by a leading U.S. auto insurer for claims adjustors concerning the handling of certain types of crash-related injury claims. This training manual identified injury claims resulting from motor vehicle crashes with US\$1000 or less in claimant's vehicle property damage as those that should be categorized, or "segmented," separately from all other injury claims. Claims adjustors were instructed that, as a general precept, crashes with minimal damage are unlikely to – or cannot – cause significant or permanent injury. Thus, any claim for injury in the presence of minimal vehicle property damage was to be handled as a type of fraudulent claim and claims adjustors were instructed that, regardless of medical evidence of injury, the injury should not or could not have occurred because of the nature of the crash, and the claim goal was to close without payment. The MIST claims segmenting protocol continues to be used up to the present time, and many other insurers have adopted similar claims handling practices based on an assumed lack of relationship between vehicle property damage below a certain monetary level and the potential for injury.

The MIST protocol uses vehicle property damage as a construct for injury presence rather than probability, as all injury claims in the presence

of [[US\$1000 vehicle property damage are considered to be false, while crashes with]]US\$1000 vehicle property damage are considered as possibly injury producing, with the medical records used as the determinant of injury presence and severity.¹⁶⁸

As demonstrated by this excerpt, the lack of injury in minor property damage collisions was *assumed*, rather than scientifically correlated, *regardless of the medical evidence of injury*.

Thus, the MIST theory was adopted without scientific testing and only after ignoring evidence tending to show the theory was false.

Actual testing of the MIST theory shows that the theory is scientifically invalid.¹⁶⁹

Conclusion	Source
“Based upon our best evidence synthesis, the level of vehicle property damage appears to be an invalid construct for injury presence, severity, or duration. The MIST protocol for prediction of injury does not appear to be valid.”	Exhibit [???], Croft & Freeman, <i>Correlating crash severity with injury risk, injury severity, and long-term symptoms in low velocity motor vehicle collisions</i> at 320.
“A common misconception formulated is that the amount of motor vehicle crash damage offers a direct correlation to the degree of occupant injury. [¶] One of the major factors relating to occupant injury due to a collision is the G force to which the occupant is subjected. . . . [T]he G force sustained by the vehicle beyond the crush zone or arresting distance is transferred to the occupant. [¶] The crush damage does not relate to the expected occupant injury, i.e., the more vehicle damage, the more chance that the occupant is injured, is not a conclusion that can be made. In fact, it is more likely the reverse. If the occupant is decelerated over a greater time/distance due to a large crush/arresting distance, then the likelihood of injury is reduced.”	Exhibit [???], Malcolm C. Robbins, <i>Lack of Relationship Between Vehicle Damage and Occupant Injury</i> SAE Technical Paper No. 970494 (1997).

168 See attached Exhibit [???], Aff. Dr. _____, ¶ 19.

169 *Id.* at ¶ 21.

<p>“[T]he injury risk is shown to be almost constant irrespective of the degree of vehicle deformation. Severity measures based on deformation depth are obviously not good predictors of neck injury risks. Other factors, such as whether stiff vehicle structures have been involved or not, have shown to be more related to neck injuries . . . [I]n order to significantly reduce the number of . . . neck injuries in rear end impacts, minor and moderate crash severity must be the main focus since they account for the majority of the incidences.”</p>	<p>Exhibit [???], Bjorn Lundell, Lotta Jakobsson, Bo Alfredsson, Martin Lindstrom & Lennart Simonsson, <i>The WHIPS seat – A car seat for improved protection against neck injuries in rear end impacts</i> Proc. 16th ESV Conference, Paper No. 98-S7-O-08 (1998).</p>
<p>In a literature review of over 2,000 articles regarding the validity of whiplash syndrome, researchers concluded that there is currently no epidemiologic or scientific basis for the following statements:</p> <ol style="list-style-type: none"> 1. Acute whiplash injuries do not lead to chronic pain. 2. Chronic pain resulting from whiplash injuries is usually psychogenic. 3. Whiplash injuries are unlikely to result in chronic pain in countries where there is no compensation for injury. 4. Rear-impact collisions that do not result in vehicle damage are unlikely to cause injury. 5. Whiplash trauma is biomechanically comparable with common movements of daily living. 6. There is insufficient force at the TMJ during whiplash trauma to cause injury. 7. TMJ injuries are not associated with whiplash trauma. 8. There is a direct correlation between vehicle damage and the probability of developing chronic pain after whiplash trauma. 9. Chronic pain following acute whiplash injury is cause or worsened by treatment and diagnostic testing. 10. The risk of chronic neck pain among acutely injured whiplash victims is the same as the prevalence of chronic neck pain in the general population. 	<p>Exhibit [???], Michael D. Freeman, Arthur C. Croft, Annette M. Rossignol, David S. Weaver & Mark Reiser, <i>A review and methodologic critique of the literature refuting whiplash syndrome</i> 24(1) Spine 86, 95 (1999).</p>

Conclusion	Source
Crash information from Florida law enforcement agencies demonstrate that crashes not involving bicycles, pedestrians, or vehicles exceeding 10 miles per hour resulted in an average of 318 fatalities and 46,752 injuries per year between 1994 and 1999.	Exhibit [???], Affidavit of Millie J. Seay, Director, Office of Management Research and Development for the Florida Department of Highway Safety and Motor Vehicles (July 11, 2002).
“[T]he velocities of involved vehicles and the extent of car damage are not directly related to the forces acting on the cervical spine. The occupant is less likely to be severely injured in a high-speed rear-end impact collision since the upright of the seat tends to break, converting the forces to the neck from rotation to traction. Why is it, then, that patients involved in seemingly slight collisions have severe symptoms? What can we rely on at initial examination to assess the severity of the suffered injury? Three groups of factors are likely to determine the severity of the trauma: initial clinical presentation . . . features of the accident mechanism; and finally, several biomechanical features of the collision.”	Exhibit [???], Matthias Sturzenegger, Giuseppe DiStefano, Bogdan P. Radanov & Ayesha Schnidrg, <i>Presenting symptoms and signs after whiplash injury: the influence of accident mechanisms</i> 44 <i>Neurology</i> 688, 691 (April 1994).

These test results have been published, presented at scientific conferences, and subjected to peer review. Such studies conclusively demonstrate that the amount of vehicle damage has no correlation to the severity of injuries of the vehicle’s occupants.¹⁷⁰ Accordingly, the Defendant should not be allowed to advance the MIST theory before the jury, whether through the introduction of testimony, documentary evidence, or the argument of counsel.

A. VEHICLE PROPERTY DAMAGE PHOTOGRAPHS ARE NOT A PROPER METHOD TO DETERMINE INJURY PRESENCE.

The Plaintiff anticipates that Defendant will seek to advance the debunked argument that because the Plaintiff’s vehicle was not severely damaged in the collision, the Plaintiff could not have sustained injuries. The Plaintiff anticipates

170 Peer-reviewed scientific research articles have identified factors that increase an injury victim’s susceptibility to injury in a motor vehicle collision. See attached Exhibit [???], Aff. Dr. _____ ¶¶ 24-25.

that the primary method used to advance this debunked argument is through vehicle property damage photographs.

However, “[t]he test for determining whether photographs are admissible into evidence depends upon the fairness and correctness of the portrayal of the subject.”¹⁷¹ In addition, the Court must not only determine whether the photographs are helpful to the jury,¹⁷² but also must ensure that the photographs are used for a proper purpose.¹⁷³ Moreover, “introduction of photographs must be tied to a specific witness’s testimony about the circumstances. . . .”¹⁷⁴ Furthermore, a proper foundation must be laid to introduce each individual photograph.¹⁷⁵ “[I]f a photograph serves no *valid* purpose . . . it should be excluded.”¹⁷⁶

The “subject,” or issue in this case is the nature and extent of the Plaintiff’s injuries and other damages, not whether the vehicles were damaged in the collision. Indeed, the Plaintiff is not claiming that the Defendant is responsible for any amount of property damage caused to [**his/her**] vehicle.¹⁷⁷ The vehicle property damage in this matter has been settled, evidence of which is inadmissible.¹⁷⁸ Because property damage photographs of the vehicles neither fairly nor correctly portray the Plaintiff’s injuries, the Court should exclude any use of the photographs for such purpose.

171 *McMickle v. Griffin*, 369 Ark. 318, 334, 254 S. W. 3d 729, 743 (2007); *Rich Mountain Electric Coop., Inc. v. Revels*, 311 Ark. 1, 7, 841, S. W. 2d 151, 154 (1992); see generally 29A Am. Jr. 2d *Evidence* § 975 (“To be admissible, a photograph must be a reasonably faithful representation of the object depicted and aid the jury in understanding the testimony or evaluating the issues.”); 31A C. J. S. *Evidence* § 1251 (2010) (“A photograph is admissible only if it is accurate, and is a fair and accurate representation of what it purports to represent. . . .”).

172 *Missouri P. R. Co. v. Ward*, 252 Ark. 74, 77, 477 S. W. 3d 835, 837 (1972) (holding that photographs of a vehicle hit by a train served no useful purpose).

173 *Hooks v. General Storage & Transfer Co.*, 187 Ark. 887, 892, 63 S. W. 2d 527, 530 (1933) (holding that photographs introduced for any purpose other than to show vehicle property damage should have been limited by proper instructions from the trial court).

174 *McMickle*, 369 Ark. at 337, 254 S. W. 3d at 745.

175 *Id.* at 337, 254 S. W. 3d at 746.

176 *Williams v. State*, 374 Ark. 282, 290, 287 S. W. 3d 559, 565 (2008) (emphasis added).

177 See Pl. ’s Compl. ¶ ???????? [**month, day, year**].

178 See Ark. Code Ann. § 27-53-403 (“The fact of payment of any property damage claim under this subchapter is not admissible in evidence, nor shall it be referred to in any way in any personal injury action arising from the same.

CONCLUSION

The defense's MIST theory is unsupported by competent expert testimony and by pertinent scientific literature demonstrating that it is based upon reliable principles and methods.¹⁷⁹ Accordingly, any reference to the MIST theory should be excluded at the trial of this matter, such as lay or expert testimony, attorney argument, or documentary evidence that refers directly or indirectly to the MIST theory, including but not limited to the following:

1. Causation, because causation of permanent spinal ligament injuries sustained in motor vehicle collisions lies outside the common knowledge of the jury;¹⁸⁰ or
2. Claims that medical treatments following the collision were neither reasonable nor necessary based on photographs of the vehicles, because there is not a sufficient foundation for evidence or argument that photographs of the vehicles correlate to the Plaintiff's injuries.¹⁸¹

179 Ark. R. Evid. 702; *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. at 116, 14 S. W. 3d at 519 (the overarching subject of Rule 702 "is the scientific validity, and thus the evidentiary relevance and reliability, of the principles that underlie a proposed submission. The focus, of course, must be solely on the principles and methodology, not on the conclusions they generate").

180 See attached Exhibit [???], Aff. Dr. _____ ¶¶ 10-30; *McAway v. Holland*, 266 Ark. 878, 882, 599 S. W. 2d 387, 389 (1979) ("If the subject matter is wholly scientific or so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease, or physical condition."); *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 238-39, 148 S. W. 3d 754, 759 (2004) (expert testimony is required when the asserted cause of an injury "does not lie within the jury's comprehension as a matter of common knowledge. . . ."); see generally 31A Am. Jur. 2d *Expert and Opinion Evidence* § 152 (2013) ("The opinion of a nonexpert witness is generally not competent evidence with regard to diagnosis and the potential continuance of a disease, which must be established by a physician as an expert witness."); 31A C. J. S. *Evidence* § 730 (2010) (explaining that "a non-physician may not opine on medical causation matters, and a nonexpert or lay witness may not testify as an expert and give expert testimony as to the effect of an injury, the existence or non-existence of a disease discoverable only through the training and expertise of a medical expert, or testify that the witness' subjective condition was the proximate result of an accident.").

181 See *Blissett v. Frisby*, 249 Ark. 235, 247-48, 458 S. W. 2d 735, 742 (1970) ("[T]he trial judge has . . . discretion in deciding whether there is sufficient foundation for the admission of testimony giving the amount of certain expenditures."); *Bell v. Stafford*, 284 Ark. 196, 199-200, 680 S. W. 2d 700, 703 (1984) (a foundation must be laid to establish a causal relationship between a collision and medical expenses); see generally 29A Am. Jur. 2d *Evidence* § 977 (explaining that "absent expert testimony on the correlation between vehicular damage and a plaintiff's injuries, photographs of the parties' damaged vehicles are not relevant, when no medical expert witnesses testify that the amount of damage to the plaintiff's vehicle correlates to his or her injuries."); 31A C. J. S. *Evidence* § 697 (2010) (explaining that lay witness testimony "as to damages is inadmissible where a proper foundation has not been laid, or the opinion is based on speculation.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September, 2013, I served the foregoing document by facsimile upon the opposing party's attorney of record listed below:

VIA U.S. MAIL

[insert defense attorney]
[insert defense law firm]
[insert address of defense law firm]
[insert city, state, zip]

S. Taylor Chaney

**IN THE CIRCUIT COURT OF [insert county] COUNTY, ARKANSAS CIVIL
 DIVISION**

<u>[insert client]</u>	PLAINTIFF
v.	CV- 201____-____
<u>[insert defendant]</u>	DEFENDANT

**ORDER TO EXCLUDE EVIDENCE AND ARGUMENT RELATING TO THE
 "MIST" DEFENSE THEORY UNDER THE *DAUBERT* TEST**

The Court, having considered the parties' motions and briefs herein relative to the Plaintiff's *Motion to Exclude Evidence and Argument Relating to the "MIST" Defense Theory under the Daubert Test*, hereby grants the Plaintiff's motion.

In exercising its gatekeeping function pursuant to Arkansas law,¹⁸² the Court finds that after a preliminary assessment, property damage photographs of the vehicles involved neither fairly nor correctly portray any injuries the Plaintiff may have sustained in the motor vehicle collision that forms the basis of this lawsuit.¹⁸³ The Defendant has failed to provide a sufficient foundation for either a lay witness, or an expert witness to testify that the amount of vehicle property damage correlates to the Plaintiff's injuries. Therefore, the probative value, if any, the vehicle property damage photographs may have of the Plaintiff's injuries are substantially outweighed by the danger of unfair prejudice because the photographs cannot properly be applied to any injuries that the Plaintiff may have sustained.¹⁸⁴

For these reasons, any use of the property damage photographs of the vehicles in this matter, including but not limited to lay testimony, expert testimony, and attorney argument, for the purpose of showing that the Plaintiff was or was not injured, and for the purpose of challenging the reasonableness and necessity of the Plaintiff's medical treatment, is hereby excluded from the trial of this matter.¹⁸⁵

In addition, the Court finds that terms such as "tap" or "bump,"¹⁸⁶ or any other characterization that plays down the seriousness of the collision in

182 *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. 105, 14 S. W. 3d 512 (2000) (citing *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993)).

183 *McMickle v. Griffin*, 369 Ark. 318, 334, 254 S. W. 3d 729, 743 (2007); *Rich Mountain Electric Coop., Inc. v. Revels*, 311 Ark. 1, 7, 841, S. W. 2d 151, 154 (1992); 29A Am. Jr. 2d *Evidence* § 975 (2013); 31A C. J. S. *Evidence* § 1251 (2010).

184 *McMickle*, 369 Ark. at 334, 254 S. W. 3d at 743; *Rich Mountain Electric Coop., Inc. v. Revels*, 311 Ark. at 7-8, 841 S. W. 2d at 154; Ark. R. Evid. 401; *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. at 116, 14 S. W. 3d at 519; 29A Am. Jr. 2d *Evidence* § 975 (2013); 31A C. J. S. *Evidence* § 1251 (2010).

185 *Blissett v. Frisby*, 249 Ark. 235, 247-48, 458 S. W. 2d 735, 742 (1970); *Bell v. Stafford*, 284 Ark. 196, 199-200, 680 S. W. 2d 700, 703 (1984); *Davis v. Maute*, 770 A. 2d 36, 40-41 (Del. 2001); *Baraniak v. Kurby*, 371 Ill. App. 3d 310, 317-18, 862 N. E. 2d at 1158-59 (2007); *Little R. R. & E. Co. v. Goerner*, 80 Ark. 158, 167, 95 S. W. 1007, 1011 (1906); 29A Am. Jr. 2d *Evidence* § 977 (2013).

186 *Davis v. Maute*, 770 A. 2d 36, 40-41 (Del. 2001) ("Counsel may not argue by implication what counsel may not argue directly." As a result, "defense counsel's characterization of the accident as a "fender-bender" was improper. By playing down the seriousness of the accident, Maute's counsel unmistakably suggested-without support in expert testimony-that the accident could not have caused serious personal injury to Davis."); *accord. Little R. R. & E. Co. v. Goerner*, 80 Ark. 158, 167, 95 S. W. 1007, 1011 (1906) (it is reversible error for counsel to "place before the jury as evidence indirectly by argument that which could not be produced directly in the proof").

this case, without expert testimony to support the characterization, is hereby excluded.¹⁸⁷

The Court further finds that causation of the Plaintiff's injuries is outside the usual and ordinary experience of laypersons, and is sufficiently scientific to require expert medical testimony to form an intelligent opinion.¹⁸⁸ As a result, the Defendant is prohibited from offering any evidence, such as lay testimony, attorney argument, or documentary evidence with regard to the diagnosis and treatment of the Plaintiff's injuries without expert testimony.¹⁸⁹

IT IS SO ORDERED

_____ [insert county] Circuit Judge

Dated: _____

187 *Davis*, 770 A. 2d at 40-41; *Baraniak*, 371 Ill. App. 3d at 317-18, 862 N. E. 2d at 1158-59; *Little R. R. & E. Co. v. Goerner*, 80 Ark. at 167, 95 S. W. at 1011.

188 *McAway v. Holland*, 266 Ark. 878, 882, 599 S. W. 2d 387, 389 (1979); *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 238-39, 148 S. W. 3d 754, 759 (2004); 31A Am. Jur. 2d, *Expert and Opinion Evidence* § 158 (2013); 31A Am. Jur. 2d, *Expert and Opinion Evidence* § 176 (2013); 31A Am. Jur. 2d, *Expert and Opinion Evidence* § 188 (2013); 31A C. J. S. *Evidence* § 730 (2010).

189 *McAway*, 266 Ark. 878, 599 S. W. 2d 387; 31A Am. Jur. 2d *Expert and Opinion Evidence* § 152 (2013); 31A C. J. S. *Evidence* § 730 (2010).



ARTHUR C. CROFT, PhD(c), DC, MSc, MPH

Dr. Croft is a trauma epidemiologist, a biomechanist, and an accident reconstructionist, and is board certified in chiropractic orthopaedics. He has been actively engaged in whiplash research for the past 30 years and co-authored the first and longest-selling textbook on the subject of whiplash (Whiplash Injuries: the Cervical Acceleration/Deceleration Syndrome, 3rd edition, 2002). He is also the author of Whiplash and Mild Traumatic Brain Injuries (2009), several textbook chapters, and over 350 professional papers. He was the original developer of the now widely used whiplash grading system. He has conducted more than 90 full scale human subject automobile crash tests, many of which are featured on the DVDs Machine vs. Man I and II.

He serves on the editorial boards of several professional peer-reviewed medical and engineering journals, including Spine, Clinical Neurology and Neurosurgery, Journal of Spine, Archives of Physical Medicine and Rehabilitation, SAE, Accident Analysis & Prevention, Journal of Forensic and Legal Medicine, and the Journal of Musculoskeletal Pain.

In addition to his own research, Dr. Croft has contributed to several research steering committees and has participated in RAND projects, including the cervical spine manipulation study, and has served as a grant reviewer for the National Institutes of Health (NIH).

How My Work Applies to MIST (and other) Cases

INTRODUCTION

I had already read *Reptile* by the time David Ball asked me to write a chapter describing how my work is applied to MIST cases. I realized that the substantial marginalia I'd scribbled in *Reptile* was a good jumping off point. So this chapter is about some of the more common forms of defense auto-crash reconstruction¹⁹⁰ and biomechanical sleight-of-hand, along with a few popular medical myths. All are threats to Reptilian safety.

What does “MIST” mean? “*Minor*” is vague, ill-defined and often downright misleading because, as we'll see, many MIST victims become partly or even completely disabled. And virtually all the body's tissues other than bone are *soft tissue*, including skin, muscle, ligament, disc, nerve, brain, organ, and virtually all other connective tissue. Many lawyers who have been gulled by the defense MIST myths tend to accept only cases with significant vehicle damage.

The greatest problem is uncertainty about the collision forces on the plaintiff. This uncertainty exists across a broad range of apparent collision severity, and opens the door to many kinds of defense strategies. When the plaintiff does not oppose defense experts with its own, the defense – though mostly fiction – can be hard to beat. Many plaintiffs' lawyers hope to limit this through MILs, but, in my experience, most defense experts will be allowed to testify on some level. In my opinion, a level playing field demands a balance of experts.

The defense usually begins with crash severity, including ways of understating and trivializing crash metrics, such as velocity and acceleration. This is difficult for non-experts to spot. For example, a defense biomechanist might say that the acceleration in

¹⁹⁰ Some years ago the National Highway Traffic Safety Administration exhorted us to remove the word ‘accident’ from our lexicon because it implied that motor vehicle collisions are not always preventable. In fact, 93% are attributed to human error. And because some reconstructionists specialize in bicycle, plane, boat, and other types of collisions, I coined the more descriptive term *auto crash reconstruction* (ACR).

a 5 mph delta V rear collision was 1.1 g, and compare that to the acceleration of merely stepping off a curb. Couched in the language of physics and mathematics, these “facts” mislead jurors. You can cross examine this way:

Q: How did you arrive at 1.1 g?

A: It's the delta V divided by the duration of the crash.

Q: What was the duration?

A: About two tenths of a second.

Q: That's the *mean* or *average* acceleration?

A: Yes.

Q: *Peak* acceleration would be higher?

A: Yes.

Q: How much higher?

A: Typically two to two-and-a-half times higher.

Q: So peak acceleration would be more like 2.2 to 2.8 g?

A: Approximately.

Q: And that's the vehicle's peak acceleration?

A: Well, yes.

Q: Would the peak acceleration of my client also have been 2.2 to 2.8 g?

At this point the expert may sense he's about to slide into a corner. When he reported the acceleration to be 1.1 g, he was only hoping that you'd accept this *mean* value, and that you'd think the occupant's acceleration and the vehicle's acceleration would be the same. But now you're about to force an admission that the peak acceleration would have been much higher than the mean. And he realizes that he's about to have to admit that the occupant's acceleration would have been even higher than the peak acceleration. If he doesn't admit that, he's a sitting duck. He'll likely save face and admit it.

A: Not necessarily.

Q: Would it have been less or more?

A: Probably more.

Q: Did you do those calculations?

A: No.

Q: Can you approximate my client's head acceleration?

In human-subject crash testing, peak head acceleration is typically two-and-a-half to as much as five times more than the vehicle's, and is higher in females than males.

Here's the sequence: First the car accelerates as it is hit from behind. Then there's a lag before the seatback, moving forward, accelerates the volunteer's torso forward. Then another lag. Then the forward-moving head restraint hits the head. The torso's speed is greater than the car's and the head's speed is higher than the torso. This common sequence has been known since the late 1950s.

Further, the chief acceleration duration of the head is only about 100 milliseconds – the time it takes to blink.

You can get these admissions during deposition or reserve them for trial.

You can cross-examine about the comparison to stepping off a curb:

Q: In a rear-end collision, the head moves at a different speed from the torso?

A: Yes.

Q: Properly positioned head restraints limit that speed difference.

A: Yes.

Q: It's mainly a horizontal force, isn't it?

A: Mainly, yes.

Q: The same as stepping off a curb?

A: No.

MY USUAL APPROACH

I usually start with the crash itself. *PC Crash 9.1* (Dr. Steffan Datentechnik, Linz, Austria) provides the most sophisticated software toolbox for even the most challenging reconstruction problems. *PC Crash* can be used with the equally sophisticated mathematical dynamic model *MADYMO* (TASS, the Netherlands) to model the occupant's biomechanical responses. From this highly realistic software we can develop physics-based 3-D animations. These forces and loads can be considered in light of the occupant's age, general health and other risk factors. Finally, I examine the medical imaging and medical records to see determine whether they correlate with the biomechanical factors.

Over the course of eight years, my institute conducted nearly 90 human subject and crash-test dummy full-scale crash tests,¹⁹¹ accumulating an enormous amount of data, high-speed video, and film footage. We also validated some of the first dedicated rear-impact dummies and made a number of important discoveries along the way.

¹⁹¹ In a *full-scale* crash test, two or more specially prepared and instrumented vehicles collide under controlled conditions. The term "full scale" differentiates it from sled testing, in which, among other things, pitch, roll, and yaw cannot be faithfully replicated.

RECONSTRUCTION AND BIOMECHANICS

The defense usually uses three methods: 1) A reconstruction that finds a delta V ¹⁹² of less than 5 mph for the plaintiff's vehicle, 2) use of crash-test literature which describes the crash as relatively benign and 3) comparing biomechanical force in the crash to forces in ordinary activities such as stepping off a curb. This fairytale trilogy and its interlocking *non sequiturs* can sound logical, even to attorneys. So let's take a better look.

MYTH: THE 5 MPH-RATED BUMPER

Nearly all modern cars must have bumpers that can survive up to 5 mph rigid-barrier collisions with little or no structural damage, exhaust and tail light integrity maintained, and with a trunk that can still be opened. Defense experts claim that with no structural damage to a 5 mph bumper, the delta V had to have been below 5 mph. Otherwise, they say, there'd have been damage. But while most 5 mph-rated bumpers *withstand* 5 mph impact, they are not necessarily damaged at higher speeds. Our tests rarely induced structural damage at speeds under 8-12 mph, sometimes higher. So don't be fooled.

MYTH: THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY'S 5-MPH BUMPER TEST

This one is more common, yet equally deceptive and disingenuous. I lay no blame at the feet of the Insurance Institute for Highway Safety, with whom I have enjoyed a cordial relationship for nearly three decades. The Institute conducts independent tests and posts the results on their website (www.iihs.org) and in other media, hoping that manufacturers will respond to any embarrassing and unfavorable press by quickly correcting the reported shortcoming. This has proved decidedly more effective than lobbying the National Highway Traffic Safety Administration for rule changes – which, even if passed in the legislature, can take years to implement. (The Institute does, of course, frequently advise and exhort NHTSA.)

The Institute's bumper-test goal is to post the estimated repair costs, so that buyers will avoid vehicles with high damage-repair estimates. The test is not for gauging occupant safety, but that's how defense experts use it. Let's say your client's 2013 Cadillac was rear-ended; repair estimate \$2,355. But the Institute reported that the repair estimate for a 2013 Cadillac was \$3,823.¹⁹³ So the deceptive defense expert will claim this: Since the Institute's 5 mph bumper tests caused more property damage than your client's car had, your client's delta V must have been substantially less than 5 mph. He'll call this a "benign exposure," meaning it could not have hurt anyone.

¹⁹² *Delta V* described the change in velocity that results from a collision and is typically less than the closing velocity.

¹⁹³ These numbers are all fictional.

But the Institute's test included *four*, not one, impacts, including front and rear full width impacts into a plastic-covered heavy metal bar attached to a concrete barrier at 6 mph, and front and rear corner impacts into a concrete barrier at 3 mph, in which expensive air conditioning, condensers and headlamp/tail lamp assemblies are particularly vulnerable. A few years back the Institute increased the test speed from 5 mph to 6 mph.¹⁹⁴ So there's no way to compare the Institute's tests to a *single*, rear-impact collision.

MYTH: MY FOOT SLIPPED OFF THE BRAKE

In the SOB (Slipped Off Brake) defense, as I call it, the defendant says he stopped behind the plaintiff, but then his foot slipped off the brake pedal, and his car rolled forward, under idle, and lightly bumped the plaintiff's car. The defendant usually claims to have been seven to 10 feet behind your client. Sounds plausible – on the surface, at least.

But the maximum speed of most vehicles in idle on flat surfaces is under 6 mph. Maximum acceleration is only about 0.97 fps² (about 0.03 g). Simple physics shows that the closing speed will be well below 5 mph in most cases. So if the impact caused structural damage (which requires more than 5 mph), the SOB claim is over.¹⁹⁵

Further, if the defendant's idling vehicle had really been idling, it would have taken nearly four seconds to cover the seven to 10 foot distance. And the normal perception-reaction time for events directly in front of the driver is one second. So the defendant driver is still negligent for not having reacted in a reasonable time – almost certainly because he was not looking.

In virtually all published crash-test studies, including ours, the researchers report that crashes producing delta Vs of roughly 5 mph did not cause structural damage. We crashed cars at speeds of up to 10 mph without structural damage. So even with no structural damage, closing speed could have been 10 mph.

MYTH: CRASH TEST LITERATURE AS A SOURCE OF RISK THRESHOLDS

Some authors say injury is unlikely at delta Vs of 5 mph. But this must be considered in proper context. Most crash test volunteers have been young and healthy. In earlier studies, most were male.

We sometimes hear the claim that *no long-term injuries have been reported in published human-subject crash tests*. But no long-term formal medical examinations have been reported in the literature. And one study showed that about half the volunteers in

194 The Institute has changed some of the features of these tests over time, but the results can often be obtained from the Institute's website at www.iihs.org.

195 **Ball note:** And the Reptile will take revenge on the SOB for lying.

the 2.5 mph and then 5 mph delta V did report physical discomfort. Our own tests have produced injuries at 7 mph delta V.

Human studies are done under very few controlled conditions and use volunteers who are not representative of the universe of real-world vehicle occupants. Most studies run but few tests and likewise cannot represent the universe of real-world conditions. While we gain information from these tests, no one has tried to determine the threshold of human tolerance. That would violate ethical standards.

In Europe, an auto insurer put crash-pulse recorders into some new cars. Crash-pulse recorders record crash-acceleration changes, from which crash velocities can easily be calculated. In one such study, researchers reconstructed a number of low-speed rear-impact injury crashes. These studies and others show injuries in real-world conditions at delta Vs of less than 6 mph.¹⁹⁶

MYTH: CRASH SEVERITY EQUALS = INJURY-RISK ASSUMPTION

Intuitively, people think that major damage to a vehicle means that the occupants were probably badly hurt or killed. But we've all seen such crashes from which occupants escaped without serious injury. And most of us know of such crashes where one person was badly hurt or killed while another walked away with just scratches. This points to an important fact in crash traumatology: *Human factors often mean more than the crash metrics alone.*

In college as a paramedic, I saw collisions that seemed minor, only to find occupants seriously injured and in some cases dead.

A study from the Insurance Institute for Highway Safety showed that in rear impact crashes, the largest group had little or no vehicle damage. We analyzed the biomedical and engineering literature back to 1970 looking for evidence of a correlation between crash severity and injury in low-speed collisions. We found none. So vehicle damage as an indicator of injury is arbitrary; it is not based on scientific facts or empirical evidence.

MYTH: COMPARISON OF CRASHES TO ACTIVITIES OF DAILY LIVING (ADL)

In the mid-1990's, the Allen study – in the prestigious journal *Spine* – claimed that low-speed crash forces were the same as being slapped on the back, stepping off a curb, or plopping into a chair. This study's many flaws are well known, but defense experts still use its conclusions. We pointed out later in the same journal that comparing a rear-end crash to plopping into a chair is spurious and disingenuous – like saying human flesh won't burn on the grounds that people can put out a candle with their fingertips. The

¹⁹⁶ *External validity* is a measure of how well an experimental design simulates or represents the event it was designed to model.

fact is that the forces in crash conditions are nothing like those in plopping into chairs or stepping off curbs.

Studies since Allen's, are no better; they do not replicate collision conditions. Nor have they been published in indexed, peer-reviewed journals.

MYTH: INJURY ASSESSMENT REFERENCE VALUES (IARV)

Federal Motor Vehicle Safety Standards include Head Injury Criterion (HIC), to gauge the risk of serious traumatic brain injury.¹⁹⁷ "Serious" means much more severe than concussion, and that is life threatening. But it is difficult to estimate what the HIC value would be in any real-world event, so we have no epidemiological or clinical yardstick for it.

Attempts have been made to model a number of actual concussions among professional football players by the use of game videotapes to determine impact angles and speeds, and reenacting the impacts using instrumented and helmeted crash-test dummy heads. Because of the limited number of incidents and their broad range of accelerations, these studies provide only limited insight. And the mechanisms of injury among football players are only loosely comparable to those of car occupants.

Federal head injury criteria were arrived at using human cadaver skulls and live primates in blunt, frontal forehead impacts. They can't capture the entire range of trauma that causes brain injuries. For example, the brain can be injured even without head impact. And the rotational or angular acceleration in crashes causes more harm than the linear accelerations that were used to establish the head-injury criteria. Further, side acceleration of the head is more harmful than frontal, which was the only acceleration used. And tolerance to acceleration decreases as angular velocity and duration of the acceleration increase – both of which are typically greater in crashes than in linear blunt forehead impacts.

That's why cadaver-skull and primate experiments cannot serve as surrogates for living humans for any range of brain injury severity.

DISREGARDING IMPORTANT FACTORS

Defense experts are good at not seeing factors that must be seen and taken into account.

RISK FACTOR ASSOCIATED WITH VEHICLE

The chief factor the defense ignores is *head restraint geometry*, one of the most risk-determinative factors. In the mid-90s, the Insurance Institute for Highway Safety

¹⁹⁷ Note that the term *head injury* is no longer a term of art. This is because the "head" includes the scalp, face, skull, and brain. Nevertheless, the HIC assesses the risk of traumatic brain injury (TBI).

evaluated the effectiveness of head restraints.¹⁹⁸ The first year, they reported that only 3 percent of the 164 cars tested had “good” head restraints. In 2004 they enhanced the test, and in 2006 enhanced it further so they could establish their coveted “Best Pick” rating – which your car does not get if its head restraint isn’t up to snuff.

HUMAN RISK FACTORS

Many defense experts have mechanical engineering degrees. Defense lawyers usually show that the plaintiff’s experts have no engineering degrees, to try and say their experts are better. But while I respect mechanical engineers, they are not the preeminent experts in crash traumatology.

Few mechanical engineering programs include human anatomy, physiology, traumatology, differential diagnosis or other medical subjects needed to understand traumatology.

Four years of medical or chiropractic school are required just to begin to comprehend the human body. Unlike mechanical structures made of steel, plastic or concrete, human tissue possess unique mechanical properties that have to be taken into account in the biomechanics of forensic matters. Biomechanics requires in-depth medicine with a simple application of physics – not in-depth mechanical engineering with a minimum of medicine.

MEDICAL MYTHS

50 PERCENT DISC HERNIATION

In the early 1980s, radiologists reviewed a series of CT scans. In the over-40 age group, they found 50 percent had various kinds of abnormalities, with disc herniation being just one of them. But over time, like the child’s game of Post Office, this transmogrified into the incorrect statement, “50 percent of people *without symptoms* have at least one disc herniation.”

The study’s authors and others later reported that only 20 percent with no pain have lumbar herniations, and only 8 percent have herniations in the cervical spine. On that basis, no one should say that 50 percent of adults with no pain have pre-existing herniations. They don’t.

Yet the 50 percent myth took root. Defense experts used the distortion to claim that a plaintiff’s pain is not from the crash but from her pre-existing, previously pain-free herniation.

Scientists must not extrapolate beyond their data. The results of a study about men cannot reliably be applied to women. Nor can studies of people without pain (like those in the 1980s study) be applied to people with pain (such as your client). So because people with back pain (like your client) were excluded from the 1980s study, their prevalence of herniation cannot be determined.

198 *Topset* would seem to follow logically from *backset*, the Institute’s term, but they didn’t use it, so it is a term I coined and won’t appear elsewhere unless it catches on.

WADDELL'S SIGNS AND OTHER NON-ORGANIC SIGNS

In the 1980s Waddell and colleagues categorized symptoms in chronic low-back pain patients: tenderness, simulation, distraction, regional and overreaction to stimulus. Because he believed that many reported symptoms of pain were chiefly non-organic, he proposed anyone with more than two *non-organic signs* should be evaluated for psychological problems. As a result, the defense now claims that the categories, called Waddell's Signs, show malingering, illness behavior, or somatic amplification.

Waddell's Signs	
Tenderness	1. Superficial skin tender to light touch 2. Non-anatomic deep tenderness not localized to one area
Simulation	3. Axial loading pressure on the skull of a standing patient induces lower back pain 4. Rotation: Shoulders and pelvis rotated in the same plane induces pain
Distraction	5. Difference in straight-leg raising in supine and sitting positions
Regional	6. Weakness: Many muscle groups, "give-away weakness" (patient does not give full effort on minor muscle testing) 7. Sensory: Sensory loss in a stocking or glove distribution, non-dermatomal
Overreaction	8. Disproportionate facial or verbal expression (i.e., pain behavior)

An inherent problem of Waddell's Signs is that the examiner must second-guess the patient in terms of either pain severity or which expressions of pain (grimaces, groans, etc.) show exaggeration. This is ripe for examiner bias, as we see in the *Tenderness* and *Overreaction* categories. Complicating this is a somewhat controversial phenomenon called *hypersensitivity*; a heightened level of sensitivity thought to be mediated at the spinal-cord level in some injured people.

The *Distraction* category assumes that the straight leg-raise test produces the same results in either the supine (back lying) or seated positions. So if the results are different, it's assumed that the patient is being deceptive. But a more recent study shows that such differences are common. This invalidates the *Distraction* category.

The *Regional* category is no better. It is based partly on manual testing of muscle strength, but there has been no determination of how well examiners using manual testing can spot dishonesty. Many will misunderstand or misinterpret.

The final requiem for Waddell's Signs comes from two studies. The first – a large, evidence-based review of all available studies – found *no* association between Waddell's Signs and psychological stress, illness behavior, or social gain. The study reported that Waddell's Signs cannot distinguish organic (physical) from non-organic (psychological or deceptive) matters.

A second study reported no associations between Waddell's Signs and secondary gain or malingering.

DEGENERATIVE CHANGES AND THEIR MEANING

Degenerative changes usually imply either 1) spondylosis or 2) disc disease.

Spondylosis (spinal osteoarthritis) is a common, normal aging process. *Disc disease*, though common, is not a normal condition; it is a degenerative pathology. Both spondylosis and disc disease are common, and both become more common as we age.

Trauma and other factors can make spondylosis worse. Trauma and other factors can initiate or make disc disease worse.

Spondylosis shows up in roughly half of all adults age 35, and in about 85 percent in their mid-50s. Chronic spinal pain appears in only 20-40 percent of the adult population – so most adults with spondylosis and/or disc disease are not in chronic pain. Nor does everyone in chronic pain have significant degenerative spine disease.

Most importantly, except when the degenerative spine disease is severe, it does not correlate with chronic spine pain. This means that age-related degenerative changes can never predict spine pain, unless they are severe. And those changes should never be used to apportion disability unless there is a clear clinical correlation.

Disc disease data is incomplete. But practitioners see mild and even moderate cases in people who only recently have developed pain. However, what one practitioner characterizes as “mild” can be seen by another as “moderate.”¹⁹⁹

Similarly, MRI physicians sometimes refer to herniations as *protrusions*, *prolapses* or *disc displacements*. Some physicians characterize a three millimeter posterior extension of the disc as a *herniation*; others call it a *bulge*. To clarify this, an official nomenclature was proposed by a combined task force comprising the North American Spine Society, the American Society of Spine Radiology, and the American Society of Neuro-radiology. All practitioners should follow its recommendations.

MEANING OF A NORMAL MRI

Important soft tissue injuries cannot be ruled out purely on the basis of an apparent lack of MRI findings. Conventional imaging techniques, including plain radiographs, CT, and MRI, cannot spot them all.

INJURY RECOVERY TIMES

It is a myth that most soft tissue injuries (including whiplash) resolve within 6 to twelve weeks. Over the last 60 years, there have been approximately 60 papers on the long-term prognosis of whiplash injuries. Some include neck injuries from any motor

199 A standardized grading scale can be downloaded from <http://rheumatology.oxfordjournals.org/>. This scale is more meaningful than vague descriptors such as mild, moderate, etc.

vehicle crash; others include only rear impacts. To my knowledge, *no well-designed peer-reviewed studies have found that most whiplash victims recover in twelve weeks.*

In one study, 45 percent were still symptomatic at 12 weeks. Another reported that at about 20 weeks, the two most severe groups of whiplash victims had merely stabilized. It has also been reported that 10 to 12 percent become disabled to some degree.

In a comprehensive epidemiological analysis, I've reported that there are about 3 million whiplash injuries in the U.S. each year. The number continues to climb. This is partly because, in order to effectively manage the increasing crash energy, manufacturers are using advanced, high-strength steel and ultra-high-strength steel alloys. So since the mid-1980s, cars have become 34 percent stiffer. Further, requirements to prevent seat-back collapse and rear-ejection in high speed rear impacts have made seats stiffer. So over the past two decades, we have seen a 32 percent higher biomechanical load upon the necks of occupants in crashes.

How big is this problem? We reported in a study of about 700 people that about 45 percent with chronic neck pain attributed it to whiplash. If those attributions are correct and the group is representative, then close to half of all chronic neck pain comes from vehicle crashes.

RISK FACTOR ANALYSIS

In my view, this defense tactic really asks how far someone can lean in the saddle before falling off the horse. It is inconceivable that a trained physician, particularly one experienced in neuromusculoskeletal trauma, would ignore obvious risk factors such as advanced age, prior neck pain, prior spine surgery and the patient's level of physical conditioning and general health. Further, many risk factors have been reported in the biomedical literature that crash-related trauma experts should know. The most important are being female (which essentially doubles the risk for injury), rear-impact collision, head turned at impact, prior neck injury or neck pain, poor head-restraint geometry and being caught unaware (which by itself vastly increases the risk of long-term problems). Other determinants of worse outcome include early onset of symptoms, multiple regions of injury, neurological symptoms, higher initial pain intensity, pre-existing degenerative changes in the spine, reversed cervical curvature, evidence of ligament instability and greater cognitive impairment.

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DAVID BALL

AFTERWORD

REPTILE COMMANDMENTS: Good Works & Winning²⁰⁰

Good works for the MIST specialist: For two decades, Don Keenan and I have taught that trial attorneys can repair their public image (“larcenous sewer-pit dwellers”) *only* by doing good-faith good works. Words alone can’t do it; they actually make things worse. “Good works” means *acts* that help others but that do not simultaneously profit you.

Good works also means actually *doing* something. Hands on. *Your* hands. *Your* time. Not just words. Not just money. If Don Keenan makes sandwiches – with his own hands, not from the local deli – for shelters, group homes and the Children’s Hospital Emergency Room for people who’d otherwise go hungry at lunch, you need to do things for human kind’s well-being – things you can find that need doing. Protect, feed, save, enable . . . the world is full of human needs, so you have a lot of choice.

Serving on boards of directors, donating money, hiring others to do helpful things, and taking cases to trial are all good to do, *but they don’t help when it comes to changing your public image*. It requires your hands. Not your assistants’ hands, but *yours*!

And your good works must be visible. Hiding your light under a bushel won’t repair your image. Visible good works inspire others to do them, and they show people the kind of person you really are.

So take a look at KeenansKidsFoundation.com. Whether you do something on this scale or much smaller, or combine your efforts with others to do something on this scale – *do* it. The only reason not to is that you don’t care enough about the well-being of others – which is exactly the image spread by tort-“reform” that you need to fix.

When people see you doing selfless good, their Reptile-level conclusion is that you’re a decent, trustworthy, good person who would not mislead or do harm. In screenplays, this is called *Save the Cat*.²⁰¹ It has a direct link to the Reptile. Here’s how it

200 For more on this crucial topic, see Chapter Nine in *Damages* 3, and Keenan’s monthly articles in many state trial lawyer association journals.

201 Blake Snyder; blakesnyder.com.

works: A guy running from the cops risks capture by stopping to help a kitten stuck in a tree, even though it hurts his effort to get away. From then on we like the guy, and we assume the cops are chasing him for a wrong reason. We assume this even if we hate cats.

You should, on a regular and visible basis, do your version of saving the cat – something good for others that does not simultaneously help you.

Good works are the tort-“reform” antidote for every current and upcoming tort-“reform” poison.

Since the dawn of history, selfless good-faith good works have been the *only* reliable way to repair maligned reputations. (Repentance also works, at least in America, but you can’t repent unless you admit you’ve done something wrong.)

Even if good works could not repair your image, you’d still have the civic responsibility of using – outside of litigation – what you learned from this book to make your world better and safer. But the practice of good works will work for you as an individual trial lawyer and for your firm. Good works would work for the whole profession if enough lawyers and trial lawyer’s organizations got off their butts and came on board. But most won’t. Many tell me, “We can’t afford to do selfless good works!” Yet it would cost less, and take less of time, than those silly messaging and war-room campaigns. If your state trial lawyers’ organization wants to know how, have them contact Don at donkeen@keenanskidsfoundation.com or David Ball at ball@nc.rr.com. Some have done so already, and started in the right direction.

But even without the organizations, do it yourself. It will work for you.

Easier approaches – such as using “messages,” “war rooms” or “educating the public” – are, as every competent public relations experts knows, naively counter-productive. Lawyers, and especially their organizations, should cease the destructive silliness of trying to message the public. **“Trial lawyers are good for you. Really. No, I mean it. Stop laughing. Trust me. Trust me. Pretty please? COME BACK HERE AND LISTEN TO ME DAMMIT!”**

Sure, and go kiss a rattlesnake.

No wonder so much of the public wants tort-“reform” legislation – which they will eventually get in every venue unless we change the ways in which we are trying to change our public image.

Many attorneys (such as Arkansas’ Joey McCutchen and New Jersey’s Sam Davis²⁰²) and a few state trial lawyer’s associations (Connecticut’s, Oklahoma’s, Missouri’s, North Carolina’s, and a few others) have, to some extent, come on board. But nowhere near enough. Unless more lawyers and their organizations join this effort as a major initiative, the profession is not long for this world.

202 Burnadvocates.org.

MIST AND BAD REPUTATION

Nowhere is this more of a tort-“reform” problem than with MIST cases. Much of this book explains how to show jurors that MIST injuries are neither fake nor minor, but real and catastrophic – and a common public menace. This is your door to doing good works. As a MIST specialist, you have a particular opportunity: Use what you learn in this book to develop your good works to help make your community safer. *Do not do this in conjunction with trying to get cases.*²⁰³ Instead, turn your website into a safety site, not a marketing site. And go beyond that. It’s easy and free: Bring your wisdom to driver’s ed classes,²⁰⁴ media public service announcements, and other community education opportunities.

Work with three or four other MIST specialists, or as many as necessary, to blanket the community with safety aids and programs. Most people think MIST injuries are 1) minor and 2) the result of trivial violations. Those beliefs undermine your cases. They also leave our roads dangerous because drivers don’t know how careful they have to be. That’s why most drivers do dangerous things when approaching stoplights that they’d never do on 65 mph freeways, where the consequences are obvious. Take it upon yourself to teach them better.

If you do, then as you become known as a lawyer who does selfless things to make the community safer, you’ll live in a safer community, clients will gravitate your way, and your jurors will more likely trust you. So go do some good by doing some good.

203 Though doing it, in fact, will get you cases.

204 See Chapter Five for how this can also help you find effective and inexpensive experts for trial.